SUPREME COURT,

OF THE

UNITED STATES.

IN EQUITY.

THE COUNTY OF MORGAN,
Appellant,
vs.
JOHN ALLEN, AND EDWIN S. TROWBRIDGE, SURVIVORS OF AARON ARNOLD, DECEASED.
No. 111. 78

JOHN ALLEN, AND EDWIN S. TROWBRIDGE, SURVIVORS OF AARON ARNOLD, DECEASED.
Appellants,
vs.
THE COUNTY OF MORGAN.
No. 166. 293

Appeal from the United States Circuit Court for the Southern District of Illinois.

Brief and Argument of Dearborn & Campbell, for John Allen and Edwin S. Trowbridge, survivors of Aaron Arnold Deceased. Appellees in No. 111 and Appellants in No. 166.

78 293

I.

NATURE OF THE ACTION.

This is a suit in Equity, commenced by John Allen, Edwin S. Trowbridge and Aaron Arnold, (the last having since died) as judgment creditors of the Illinois River Railroad Company, in the United States Circuit Court, for the Southern District of Illinois, against the county of Morgan and others—to reach a lot of railroad aid bonds and coupons issued by the county of Morgan to the Illinois River Railroad Company, (soon thereafter a defunct and insolvent corporation,) and which bonds and coupons the complainants contend are assets of the Illinois River Railroad Company, and should be appropriated towards the satisfaction of a judgment of over a million dollars against such railroad company, and in favor of complainants. The county of Morgan (the principal defendant) claims: First, that the vote of the people of the county under which the bonds were issued, was void, because it was upon a proposition to subscribe to three different railroad corporations by one and the same ballot. Second, that the bonds and coupons were delivered upon the condition that they should be applied in payment for work to be done by the railroad company, within the limits of the county. Third, that almost all the bonds and coupons have been paid out, under decrees of the Morgan County Circuit Court, in liquidation of claims of other creditors of such railroad company, and that the balance has been paid out for expenses, attorneys fees, &c.. Fourth, that the matured coupons did not draw interest after their maturity. Appellees (in the appeal by the county) contend, First: that the manner in which the vote was taken was simply a matter of form, and not of power, and that the county, by her acts, has estopped herself from raising a question of regularity in the vote. Second, that there was no condition attached to

the delivery of the bonds and coupons, and if there was, it was void. Third, that the decrees of the Morgan County Circuit Court were obtained by fraud, and for the purpose of concealing the bonds from the complainants, and to obtain the cancellation of the same without paying them; that the county, (being a stockholder in the railroad company) is only entitled to a credit for the amounts actually and in good faith paid out. Fourth, that the matured coupons, after their maturity, drew interest.

The cause was heard by Judges Drummond and Treat, and a decree was entered against the county, and in favor of the complainants, for the sum of 72,539.56 dollars. The county of Morgan appealed. John Allen and Edwin S. Trowbridge, survivors of Aaron Arnold, deceased, took a cross appeal, for the reason that the Court below allowed the county improper credits.

II

STATEMENT OF THE CASE.

A statement of the facts of this case, counsel think will greatly assist the Court: The Illinois River Railroad Company was incorporated by act of the Legislature of the State of Illinois, on the 11th day of February 1853, (*Private Laws, Illinois, 1853, p 53,*) and by that act and the acts amendatory thereof, such company was authorized to receive subscription to its capital stock from individuals and municipalities, issue bonds, secure the same by trust deed upon its franchise and all its other property, and borrow money thereon or sell the same. (*Private Laws, Illinois, 1854, p 207; 1857, p 105; 1857, p 848; 1859, p 457.*) On the 1st day of November 1858, that company issued thirteen hundred and twenty bonds, representing $1,020,000 with interest coupons thereunto attached, and secured the same by a trust deed to

Studwell, Hopkins & Cobb, as trustees, conveying its franchise and all its other property, it being provided in the trust deed, that in case of a failure to pay the interest coupons as they fell due, the principal sum should fall due, and the trustees, if they saw fit, could take possession of the road and sell the same; (record 16-25). The bonds and coupons were negotiated, the company failed to meet the interest, and on the 17th day of December 1862, the trustees filed a bill in the United States Circuit Court for the southern district of Illinois, to foreclose the trust deed, (rec. 11 33)-the directors of the railroad company in July 1862, having surrendered and delivered the road to the trustees. (Rec 115.) At the June term 1863, a decree was rendered, directing a sale of the franchise and property described in the trust deed. (Rec. 34-41.) On the 1st day of October 1863, the property and franchise were sold under the decree for $400,000. Report of the sale was made, which was duly approved by the court on the 24th day of June 1864, and the sale not amounting to the debt by $1,061,292,56, a judgment was rendered by the Court for that sum in favor of the trustees, and against the railroad company. (Rec. 41-45). July 6th 1869, the court entered an order discharging the trustees from further duty. (Rec. 45 46.) In April or May 1862 the appellees in the appeal by the county of Morgan, became the owners of $850,000 or $900,000 of the principal of the bonds with the coupons attached, and subsequently and prior to the 15th day of March 1868, became the owners of the balance of the 1320 bonds with their coupons, and from their purchase hitherto have been such owners,—no one else claiming any interest therein. (Rec. 111 and 112.) No part of the judgment having been paid and the appellees being the equitable owners of the same, file this bill to reach the assets following:

At the November general election held in Morgan county in 1856, after due notice had been given of the same, the people of the county voted for a subscription in bonds of $50,000 to the capital stock of the Illinois River Rail Road Company, the bonds to be issued by the county redeemable on the 1st day of March 1877, and to bear interest at 6 per cent. per annum, payable annually at the American Exchange Bank of New York. (Rec 228 and 229.)

Accordingly, at the December term, 1856, of the County Court of Morgan county, upon the application of the railroad company, $50,000 in bonds was subscribed to the capital stock of the railroad company, and the County Judge was appointed to "represent the county, as a stock holder, according to the charterrules and by-laws of the company, and to provide for the issuing and delivery of the bonds as aforesaid, as they may be required," (rec. 230.) Jan. 29, 1857, by act of the Legislature of Illinois, entitled "an act to amend the charter of the Illinois River Railroad Company," in and by section 16 thereof, it is provided: "The votes taken in the coun-"ties of Morgan and Mason, and the city of Pekin, for sub-"scribing stock to said railroad company, are hereby declared "to have been legally made, and taken, and stock shall be sub-"scribed by the County Courts of said counties, and the proper "authority of the city, in pursuance of the orders under "which said votes were taken, and bonds shall be issued for "said subscriptions accordingly." (Private Laws, 1857, p 105-108.) At the September term, 1857, of the same County Court, and on the 16th day of Sept., it was ordered as follows: "That there be delivered to the said Illinois River Rail-"road Company the amount of $50,000, in 100 bonds of this "county, of this date, No. 1 to 100, payable to said company, "each being for $500, redeemable at the American Exchange

"Bank, in the city of New York, on the first day of March "1877, each of said mentioned bonds to have coupons or interest "warrants, attached thereto for interest, payable annually, from "and after the first of March next, at six per cent. per annum." And it was then further ordered, "that the certificates of stock "in the company be deposited with the treasurer of the county "for safe keeping, and that one copy of the bonds delivered to "the company be deposited with the County Clerk, and another "with the treasurer, to be carefully preserved in their respective "offices" (Rec. 231 & 232.) The bonds and coupons were so prepared, and about the month of December, 1857, the County Judge, in behalf of the county, delivered the bonds and coupons (with the first coupon cut off) to Elliott & Brown, bankers for the railroad company, doing business at the county seat of the county, to be delivered by them to the railroad company, upon the railroad company delivering, in return, a certificate of stock in the railroad company, in favor of the county. (Elliott Evi. rec. 106 to 107; Exhibit "B," rec. 135, Elliotts & Browns Evi. rec. 274 to 277. *Morgan county et. al., vs. Thomas, et. al.*, 76 *Illinois*, 120-148.

Either before or about the time of this last order the board of directors of the railroad company ordered that the certificate of stock be delivered to the county, and that the bonds be deposited with Elliott & Brown, to be paid out according to the company's order. (Rec. 277.) On the 17th of December 1857 the certificate of stock was received from the company by Elliott & Brown, and they gave to the company a receipt for the bonds, and certified that they held the bonds and coupons, less first coupon, subject to order of the board of directors of the railroad company. (Rec. 275). Elliott & Brown were authorized by the county Judge to obtain the certificate of stock for the county. (Elliott's evi. rec. 107). At a term of

the same county court in April 1858, it was ordered that the county Judge represent the stock held by the county in the rail road company and to cast the vote of the county at any election thereafter to be held for directors, or in any other matter where the interests of the county were involved. (Rec. 232.) The county kept, in the County Clerk's office, a register of the bonds, showing the date of the bonds; that they were delivered to the railroad company, and the manner in which they were disposed of. (Rec between 236 & 237).—The county paid to Elliott & Brown interest coupons due March 1st, 1859, and March 1st, 1860, and the money was placed to the credit of the railroad company. (Elliott Evi., Rec. 107 & 274 Register of bonds, Rec. between 236 & 237). After all the above proceedings, and either about the 1st of March, 1861, or March 1st, 1862, the then County Judge directed Elliott & Brown not to deliver the bonds and coupons to the railroad company, alleging, as a reason, that the bonds were to be paid only for work done in the county—the county agreeing to indemnify Elliott & Brown against any damages in not surrendering them. (Elliott's Evi., Rec. 107 & 108 & 276). After these instructions, the railroad company demanded a part of the bonds and coupons, but Elliott & Brown, because of the instructions, refused to give them up. (Elliott's Evi., 107 and 110 and 276). The charter of the Illinois River Railroad Company authorized it to build a line of railroad from the town of Jacksonville via Virginia, in Cass county, &c. (*Private Laws* 1853-53). After the purchase of the road, under the foreclosure proceedings before mentioned, the purchasers conveyed the franchise and property to a new corporation by the name of the Peoria, Pekin & Jacksonville Railroad Company, which afterwards completed the road from Virginia, Cass county, to the town of Jacksonville, in Morgan

county. *Now as to the disposition of the bonds and coupons:*

First, Two men, by the name of Vail and Ladd, judgment creditors of the Illinois River Railroad Company, on November 17th, 1862, served Elliott & Brown with garnishee process, to reach said bonds and coupons, as assets of the Illinois River Railroad Company. Thereupon, Elliott & Brown, on the 28th day of February, 1863, to protect themselves, filed a bill of interpleader in the Morgan County Circuit Court, against Vail, Ladd, Richard S. Thomas, William Thomas, Illinois River Railroad Company, Alexander Studwell, Lucius Hopkins and George T. Cobb, trustees, and Morgan county.

At the September term, 1863, an interlocutory decree was entered, that Elliott & Brown retain two hundred dollars ($200) of the matured coupons for their services, attorneys fees and expenses, and be discharged; that the bonds and coupons be deposited with M. P. Ayers & Co., bankers, at the city of Jacksonville; that defendants answer, and their answers stand as cross bills, and that thereafter the case be docketed, Richard S. Thomas, vs. the County of Morgan, et. al. (Rec. 58 & 59).

At the September term, 1865, upon a final hearing, all the cross bills were dismissed, except Morgan county's. Whereupon, all appealed except Morgan county. (Rec. 60 and 61). At the January term, 1866, of the Supreme Court, the case was decided—*see Thomas, et. al., vs. the county of Morgan, et. al.*, 39 *Ill.*, 496. As to the claim of R. S. Thomas, (who was president of the railroad company at the time the bonds were delivered to Elliott & Brown,] the Court decided that, as he had made a definite representation to the county, that the bonds were to be used only for work done in the county, and had notice of the understanding of the county, that the bonds were to be so used, he was concluded, and that good faith would forbid him from taking any of the bonds. As to the

claim of William Thomas—which was based upon two orders, each for two thousand dollars of the bonds, issued by the Illinois River Railroad Company, to Allen and McGrady, contractors on the road, and by them assigned to him—that inasmuch as Allen and McGrady had agreed that the Morgan county bonds should only be used for work done in the county, William Thomas stood in their shoes, and from the fact that he was a director in the Illinois River Railroad Company at the time, he must have had notice, and his cross bill was properly dismissed.

As to the claims of Vail and Ladd, it was decided that as they were judgment creditors, the county could not prove that the delivery of the bonds was not absolute, as its records indicated; that any agreement, or understanding, between the company and the county of which they had no knowledge, and the effect of which would be to place these bonds beyond their reach as creditors, would be fraudulent as to them; that they had a right to regard them as assets in the hands of the company, and a decree should have been entered in their favor.—Studwell, Hopkins and Cobb did not assign errors.

The decree being affirmed as to all parties except Vail and Ladd,—reversed and remanded, with instructions to render decree in conformity with opinion

At a chancery term of the circuit court in Morgan county, May 28th, 1866, in conformity with the above opinion, a decree was entered, providing for the payment, out of the bonds, of the Ladd judgment, interest and costs, $1,913.19, the judgment, interest and costs of Vail, $5,094.41, fixing the value of the bonds at forty (40) cents on the dollar, and by consent of Vail, Ladd and Morgan county, ordering the county to pay these sums in cash, and retire bonds at the rate of forty [40] cents on the dollar; and that M. P. Ayers & Co. deliver to

Morgan county $17,520,24 of the bonds in par value, and by consent, it was further ordered that Morgan county be substituted to the rights of Vail and Ladd under their judgments (rec. 62 and 63). Not a particle of evidence was heard as to the value of the bonds, but the solicitors for Vail and Ladd, (Dummer and McClure) told the county she could fix the value at what she desired, and the county, with the avowed purpose to retire as many bonds as possible, drafted the decree fixing the value as above stated, it being understood at the time that Vail and Ladd should not take the bonds, but receive the amount of their judgments in money; accordingly the county paid to complainants solicitors $7008.10 in money, and procured from M. P. Ayers & Co. thirty five [35] of said bonds, Nos. eight [8] to forty-two [42] both inclusive, with all coupons thereon, except coupons numbers one, two and three [1, 2, and 3,] and ordered them cancelled, which was done accordingly. [evi. Morrison 95].

Notwithstanding that at this time the matured coupons on the bonds were at par value, and exceeded in amount and value several thousand dollars what was necessary to pay off said judgments, [evi. Morrison, 95; evi. McClure, 105 and 106; evi. Whitlock, 101.] The object of the arrangement says the then county Judge, was "*to get as many of the bonds out of the way as possible, not knowing but that there might be other litigation about them.*" [Rec. 101.]

By this fraudulent transaction, if it can be sustained, the county made a clear gain of about seventeen thousand dollars, ($17,000) out of the bonds and coupons belonging to the creditors of the Illinois River Railroad Company. Hereafter, we shall designate this case as the "Vail and Ladd case."

Second. On the 13th day of September, 1867, James Blair and others, pretending to be judgment creditors of the Illinois River Railroad Company, to the amount of about twelve

thousand dollars, [$12,000] with interest, filed a creditor's bill in Morgan county, against Morgan county, the Illinois River Railroad Company, M. P. Ayers & Co., seeking to obtain the balance of said bonds and coupons, as assets of the Illinois River Railroad Company. [Rec. 237]. November 27, 1867, Henry T. Thomas, as administrator of the estate of Richard S. Thomas, deceased, and Francis Lowe, also became parties complainant, claiming to have judgment to the amount of nearly thirty thousand dollars [$30,000] with interest. [Rec. 241]. On the same day, B. S. Prettyman, as vice president and attorney, enters the appearance of the defunct Illinois River Railroad Company. [Rec. 242].

On the same day, Morgan county filed her answer, admitting the subscription by the county, the issuing of the bonds, &c., but setting up the stipulation, or representation, between Richard S. Thomas, as president of the railroad company, and the county, as to the application of the bonds, and denying the rights of complainants to the bonds; that the Illinois River Railroad Company had failed to do the work, or build the road in Morgan county, and was insolvent; sets up decree in case of Richard S. Thomas, vs. the county of Morgan, rendered under decision in 39 *Illinois*, 496, *supra*, as conclusive against Thomas' administrator, and denies the validity of all the judgments; sets up the pendency of the suit of Studwell, Hopkins and Cobb in the United States Circuit Court, and that the county had been served with process therein, [rec. 256 and 257].

The suit of Studwell et. al. referred to in the above answer, was commenced on the 22d of October, 1867, in the United States Circuit Court, for the Southern District of Illinois, by Studwell, et. al., as trustees aforesaid, to reach these bonds as assets of the Illinois River Railroad Company, to apply on the

judgment in their favor before mentioned.

Process had been served on Morgan county, [rec. 257]. The solicitor [Dummer] for Blair and others, hearing of the suit of Studwell, et. al., and fearing that the complainants therein would dismiss their suit in the United States Court, and interplead in the Blair case, and as their claim was over a million dollars, would absorb most of said bonds, and leave his clients [all of complainants in Blair case] but little, in writing proposed to the County Judge of Morgan county, that if he would consent to a decree immediately, and before Studwell, et. al., could interplead, he would take six thousand dollars ($6,000) in the bonds, and six thousand dollars (6,000) in money, and out of the same, William Thomas should be paid, pro rata, on his claim of four thousand dollars ($4,000) against the county, and his clients would release their claims on the bonds and coupons, and the county could so redeem them.

The county, with a view of favoring the project, and expediting the matter, to prevent Studwell, et. al., from interpleading, accepted Judge Dummer's proposition, (exhibit "A," 134 and 135, County Judge's evi., 101-104; solicitor for complainants evi., 124-126). And accordingly, within two days after the county had answered, the solicitor for Blair, et al., and the county, appeared in court, and, without any evidence being heard, the county consented to a decree in favor of the complainants,—*Blair et al.*—of $41,399.24, (the amount of pretended claims of claimants therein) and also consented that the balance of the bonds, sixty-six, (66) in number, be turned over to them. The solicitor of the county of Morgan under this decree obtained the bonds and coupons, and delivered to the solicitor of Blair et. al., six thousand dollars, ($6000) of the principal, and the coupons thereunto attached, maturing on the first day of March 1867, and thereafter, and delivered the

rest to the County Court of Morgan county. The six thousand dollars ($6,000) in money was paid, and neither Blair, et. al., nor their solicitors, nor any one for them, ever had any other of said bonds in possession, except the six thousand dollars ($6,000). (See evi. in record last referred to).

Although, at this time, the matured coupons, then due and unpaid—which were at par value—amounted to several thousand dollars more than twelve thousand ($12,000 and out of which said $12,000, said county should have satisfied herself, but instead thereof, at the March term, 1869, the County Court ordered all the balance of said bonds burned and destroyed, except from 61 to 100, both inclusive, and upon these she burned and destroyed the coupons for the years from 1861 to 1868, both inclusive, (rec. 219). This decree was made in the face of the allegations in the answer of Morgan county, filed only two days before, setting forth that the judgments were invalid, and the estopple against the claim of Richard S. Thomas; and in the face of the facts that about $1,000 of the claims of A. and J. Haines was actually barred by limitation before the suit in which the judgment was rendered was commenced; that the judgment of $3,560 in favor of Harvey O'Neal, et. al., was void, because no summons was served, and no entry of appearance of the railroad company. That the claim of Henry T. Thomas, as administrator of Richard S. Thomas, was the same claim which the Supreme Court, in 39 *Illinois*, 496, *supra*, decided was not properly allowable, amounting to $24,446.05. That the claim of Benjamin Beesley was also barred by limitation, before suit was instituted; that the claim of Reuben Bergstresser of $1,522.92, was also barred; that the claim of Francis Lowe of $3,303.59, was also barred—being in all more than three-fourths of the amount of judgments of Blair, et. al., upon which the decree was en-

tered.

The judgments upon the claims that were barred, were obtained in the month of November, 1866, within a few days of one another—all the suits having been brought by Henry E. Dummer, as attorney, (who was solicitor for Blair, et. al.,) and in all of which B. S. Prettyman, pretending to be vice-president of the Illinois River Railroad Company, entered its appearance, which was over four years after the railroad had been surrendered to the trustees, and was over four years after the last meeting of the directors, and more than two years after the legislature had recognized its dissolution, by an act in revision of the charter, incorporating the Peoria, Pekin & Jacksonville Railroad Company. (*Private Laws*, 1863, 234; *Private Laws*, 1865, 203).

The sole purpose of the county, in all these proceedings, as the then County Judge, and agent of the county, says: "was to defeat the suit of Studwell, Hopkins and Cobb, in their suit then pending in the United States Circuit Court, and to make a settlement advantageous to the county—the county, and its solicitor, being anxious to get a final decree before the commencement of the January term of the United States Circuit Court, so as to use the decree in defeating the suit of Studwell, et. al., (rec. 102.)"

By this fraudulent conduct, the county actually gained nearly forty thousand dollars. Hereafter, we shall designate this suit as the "Blair suit."

Third, William Thomas refused to accept the pro rata share under the agreement in the Blair case, (Mr. Dummer failing to return such pro rata share to the county, but appropriating it to the use of his clients,) (rec. 116) and in April, 1868, he filed his bill in chancery, in Morgan county, against Morgan county, et. al., to reach the bonds as a fund out of which to

obtain payment of his two orders, and enjoining the appropriation of the bonds under the Blair decree. A demurrer was interposed to the bill, and the same was sustained. Thomas appealed, and at the January term, 1871, the case was decided. (*See case William Thomas, vs. the County of Morgan*, 59 *Ill.*, 479) and the decree was reversed.

It was here decided that, even though the bonds were conditionally delivered, to be paid out only for work done in the county, the bill shows that the successor of the Illinois River Railroad Company has completed the work in Morgan county, which performed the condition of delivery, and as Allen & McGrady were to receive $4,000 of the bonds for work in the county, and as the order for the bonds had been assigned by Allen & McGrady to William Thomas, it was, in equity, an assignment of so many of the bonds to William Thomas; that these bonds are a trust fund in the custody of the Court, and it should see that it is not wasted or misapplied; that the delivery of the bonds under the Blair decree, when the complainants in the suit had agreed to take $12,000 in settlement of their claims, was a wasting and misapplication of the fund; that, although William Thomas is not a judgment creditor, his bill is based on his equitable right to the fund—he being an equitable assignee of a portion of it—it being a trust fund, &c.

The case was then remanded. The county filed an answer, claiming that its bonds had been all cancelled, except those disposed of pursuant to previous decrees. West and Schooly filed cross bills, setting up due bills and orders received by them from R. S. Thomas, as president of the Illinois River Railroad Company, on the treasurer of the company.

On the 28th day of June 1870, Morgan county filed her bill in chancery in Morgan county against the Peoria, Pekin &

Jacksonville Railroad Company to obtain possession of $20,000 of the bonds which the county had donated to it, upon the ground that they had been improperly and fraudulently obtained. (Rec. 278.) Upon the defendants answer being filed showing that $10,000 of the bonds had been delivered to Isaac L. Morrison, by an amendment he was made a defendant. Afterwards Wm. Thomas, Schooley and West were made defendants. Schooley and West filed cross bills, setting up their claims.

At the September term, 1873, it was stipulated that the cases of Wm. Thomas vs. Morgan county, et. al., and Morgan county vs Peoria, Pekin & Jacksonville Railroad Company be tried to gether. On the hearing at that time, it was decreed that the Peoria, Pekin & Jacksonville Railroad Company and Isaac L. Morrison return the $20,000 in bonds to the custody of the county; that eight of the bonds, with coupons from March 1860 be delivered to Wm. Thomas, and if the county could not deliver the coupons, to pay their equivalent at par value in money. That sufficient of said bonds be sold to pay the claims of Schooley and West, etc.

The Peoria, Pekin & Jacksonville Railroad Company, Isaac L. Morrison &c., appealed, and the case was decided at the January term 1875. (*see Morgan County et. al., vs. Thomas et. al. 76 Ill. 120*) and the Supreme Court affirmed the decree. The Court decided that the Peoria, Pekin & Jacksonville Railroad Company is a new organization, totally distinct from and independent of the Illinois River Railroad Company and was not entitled to the subscription or bonds of Morgan county, and that such bonds could not be donated to it either by the county or by act of the Legislature. That Wm. Thomas, Schooly & West are creditors of the Illinois River Railroad Company, and as such, are entitled to any assets of that company; that

the bonds are a trust fund to be held for the payment of the debts of the Illinois River Railroad company; that the county as a stockholder, is interested in the preservation of the company's assets, and their appropriation to the payment of its debts, and is also interested in having them returned to the custody whence they were improperly removed, that its obligations to others having claims upon them might be discharged, &c., (see opinion in above case, rec. 293-298]. Under this last decree so affirmed, the Peoria, Pekin & Jacksonville Railroad Company and Isaac L. Morrison returned $19,000 of the bonds, with coupons attached, to the county, (rec. 139) — eleven of the bonds, and coupons attached, were partly absorbed in paying William Thomas, Schooly & West, (rec. 227).

The above case of Morgan County, et. al., vs. Thomas, et. al., 76 *Illinois*, 129, was pending for decision in the Supreme Court prior to the time Morgan county answered in this case in the Court below, and when the solicitors for the complainants in the case now before the Court, asked for a rule on the defendants to answer, the solicitor for Morgan county asked to have the case stand until the above decision was rendered, insisting that in that case the facts which would arise in this case were before the Supreme Court, and the decision therein would settle this case, and upon that representation, and at the instance of the defendents, the solicitors for complainants continued this case for several terms, (rec. 48). The facts in this case are stronger against the county than they were in that. We claim that that decision ought to be decisive of this case.

Fourth. The county paid $3,500 in county orders to Morrison & Epler, for their services as solicitors in behalf of the county, from the time Vail and Ladd began, up to the time the case of William Thomas vs. Morgan County, was disposed

of in the Supreme Court, in the 59 *Illinois*, 479.

In the cases of William Thomas, vs. Morgan County, et. al., and Morgan County vs. the Peoria, Pekin & Jacksonville Railroad Company, et. al., the county paid Dummer & Springer, as her solicitors, $1,798, William Thomas' costs, $129.14 and $134.52 for other costs.

It appears from the answers, bills, pleadings and acts and doings of Morgan county in all these proceedings, instead of attempting to save and preserve the fund for its legitimate purposes, she was trying to destroy the fund; instead of litigating for the benefit of those entitled to the fund, she was attempting to deprive them of it for her own benefit—her whole cause has been in direct antagonism to the interest of the parties entitled to the fund, viz: The creditors of the Illinois River Railroad Company. The foregoing presents the facts, at some length, as found in the record and testimony in this case.

III.

ACTION OF THE COURT BELOW.

At the January term, 1877, of the court below; this cause was heard and a decree rendered in substance as follows:

1st. That the bonds and coupons are assets of the Illinois River Railroad Company for the payment of debts against the company, except so far as any portion thereof may have been lawfully appropriated and absorbed.

2nd. That complainants are the equitable owners of the judgment against said railroad company in favor of Alexander Studwell et. al. of $1,061,200.56, and are entitled to the payment of same out of said assets.

3d. That for the purpose of ascertaining the amount of said assets, the cause is referred to Anthony Knapp, Esq., as special master to state an account upon the evidence on file, and

which may be produced by the parties and report to this court upon the matters following:

First. The dates, amounts, rates of interest and maturity of all bonds and coupons issued by Morgan county to the Illinois River Railroad Company that are specified in the bill of complaint and delivered to said railroad company, or placed in the hands of any agent or trustee of said railroad company, and also the rate and amount of interest on matured coupons.

Second. The amount of money actually paid by Morgan county to the creditors of said railroad company, with the dates thereof and to whom paid.

Third. The amount of said bonds and coupons that have been delivered to the creditors of said railroad company or sold under the decree in favor of William Thomas et. al. marked as exhibit No 7, herein. (rec. 291 and 292) omitting the bonds and coupons claimed by Morgan county to have been satisfied in compromising the cases of Vail and Ladd and James Blair and others mentioned in the bill of complaint and against Morgan county, et. al., except $6000, delivered to James Blair et. al., in the compromise of the Blair case, giving dates and the persons to whom delivered.

Fourth. The amount of taxable costs and necessary legal expenses which said Morgan county has paid in the litigation relating to said bonds and coupons.

Fifth. The amount, date, and number of all bonds and coupons now in possession of the defendants.

Sixth Whether the county is entitled to any other or further credits in respect to said bonds and coupons.

Seventh. That said Master after calculating the entire amount of the bonds and coupons issued by the county as aforesaid, adding the legal interest on matured coupons, will deduct the amounts found under the second, third, fourth,

fifth and sixth directions aforesaid, first from the amount due as interest at the time of such payments, if such interest was then sufficient, and report to to this court by the first day of June next, the balance of the principal and interest then due.

That the Master also report whether the defendants, Henry Dummer and Morgan county or either, are or is liable under the compromise in the Blair case for any amount paid for William Thomas or over paid in said compromise. (rec. 85 and 86.)

At the June term following the special Master reported as follows:

First, "In response to the first direction in said decree, he "finds that Morgan county, on the 10th day of September, "A. D. 1857, issued 100 bonds, of $500 each, in all $50,000, "all dated the said day and year, payable on March 1st, 1877, "at the American Exchange Bank, in New York city, with "six per cent. interest, per annum, payable at said bank on the "1st day of March, 1858, and on the same day in each year "thereafter, according to coupons attached to said bonds."

"These bonds were thus issued to and for the benefit of the "Illinois River Railroad Company, and were placed by the "county with Messrs. Elliott & Brown, bankers in Jackson- "ville, in said county, first detaching the coupons that became "due March 1st, 1858."

"The coupons on all said bonds falling due March 1st, 1859 "and 1860, were paid at maturity, by the county, to Elliott & "Brown, for the use of the railroad company."

"The rate and amount of interest on matured coupons will "be shown hereafter."

Second, "In response to the second direction, he reports that "Morgan county has paid, in money, on account of the said "bonds, to the creditors of the railroad company, as follows:

"June 1st, 1866, to Vail, in satisfaction of his judgment

"against said railroad company..... $5,994.91

"Same date, to Dodge, administrator, &c., of
"Ladd, in satisfaction of like judgment..... 1,913.19

"Total..... $7,008.10

"Costs paid on same..... 52.72

"November 29th, 1867, to H. E. Dummer, Esq.,
"solicitor for Blair and others, judgment creditors
"of said company..... 6,000.00

"These items included all the money payments made to the "said creditors, except to William Thomas, as hereafter shown.

Third, "In response to the third direction, he reports: The "amount of bonds and coupons delivered to said creditors, or "sold under the decree in favor of William Thomas and others, "he finds to be as follows:

First, "There was delivered to Messrs. Elliott & Brown, for "expenses in September, 1863, matured coupons on bonds Nos. "1, 2, 3, 4, 5 and 6, $30 each, due March 1st, 1861, $180, also "coupons, on bond No. 1, $30, due March 1st, 1862, in all $210.

Second, "To William Thomas was delivered, December 11, "1875, eight bonds, for $500 each, in all $4,000, and the county "paid him, in money, the sum of $2,160, being in full for "all the coupons which should have been on said bonds, "and which takes out of consideration the said bonds, and all "coupons pertaining thereto.

Third, "November 29th, 1869, there was delivered to H. E. "Dummer, Esq., solicitor of and for Blair and others' "creditors, &c., twelve bonds, $500 each, in all $6,000, with "coupons thereon due March 1st., 1867, and subsequent years.

"January 8th, 1876, there was sold, by the Master in Chan- "cery of Morgan county, for the payment of the judgment in

"favor of Schooly & West, bonds Nos. 61 and 62, $1,066.66 all, with coupons thereon, due March 1st, 1870, and subsequent "years; also two coupons on bonds No. 63, for $20 each, due "March 1st, 1870 and 1871, and with proceeds of which he "paid said judgment, and the costs of sale, leaving balance in "his hands of 39 cents, and which retired said bonds and in "terest on the same, due on and after March 1st, 1870.

Fourth, "In response to the fourth direction, he reports: "That the county has paid, in taxable costs and necessary legal "expenses, attending the litigation about these bonds, as "follows:

"June 1st, 1866, to clerk of Morgan county, for costs in "suit, $52.72.

"Same date, to Morrison & Epler, attorneys fees in cases in "Circuit Court and in Supreme Court, (39 *Ill., Rep.* 496), and "subsequent services in Circuit Court in said case, upon remo- "val from the Supreme Court, $3,500.

"October 1st, 1869, to Morrison & Epler, attorneys, for ser- "vices in the Blair case, and in the case in United States Cir- "cuit Court here, and in case of William Thomas, in the Cir- "cuit and Supreme Court, $1,200.

"January 1st, 1874, for costs in all these various suits, date "of payment, and amount agreed upon by the respective coun- "sel before me, $2,102.66.

Fifth, "In response to the fifth direction, as to amount of "bonds; &c., in the possession of defendants herein, he reports: "That there are, in the possession of Morgan county, and, as "he understands, uncancelled, bonds to the amount of $5,000 of "said issue, and which should have thereon all the coupons "due March 1st., 1861, and subsequent years; that there are "in the possession of the defendant, I. L. Morrison, $9,000 of "said bonds, with coupons thereon, due March 1st, 1870, and

"subsequent years; that said defendant, Morrison, has also "sold two bonds, $1,000 in all, with the same coupon as last "above, and which are now held by some outside party.

"Sixth. In response to the sixth direction he reports, that "he knows of no other credits to which the county is entitled "in the way of payments on these bonds; no claim was made "before me, except that the county, by her solicitors, claimed "that under the settlement and payment made June 1st '66 "of the Vail and Ladd judgments and in accordance with the "order and decree of the Morgan Circuit Court, there was then "retired and paid of said bonds the sum of $17,500, the vali- "dity of which claim he does not pass upon, as he considers "that under the third direction of the decree herein, the same "is excluded from his consideration, and in computing the "amounts due on these bonds he has treated the said bonds as "still subsisting obligations of the county.

"Seventh, In response to the seventh direction, to compute "the amount of the bonds and coupons aforesaid, adding the "legal interest on matured coupons, and then deducting the "amounts of payments in money, costs, &c., and bonds deliv- "ered as found by him under the directions of said decree and "report thereon, he reports as follows:

"That he has computed the interest due on said bonds, the "first interest being for the year due March 1st 1861, and has "computed interest on each amount of yearly interest from the "time the same became due and at the rate of six per cent. per "annum, and has in the first instance of payment being made "by the said county, deducted said payment, and in the case of "the subsequent payments, he found they did not equal the "interest due at the times of such payments, and for conve- "nience and believing it to be equitable, he has allowed the "county interest at the same rate upon such payments, while

"computing at the same time against the county interest upon "all the coupons from their maturity.

"He reports that, under the computation, he has thus made, "and deducting out all the cash payments of every kind, and "the sum of all bonds and coupons delivered to the creditors "of the railroad company by said county, there remains due "from the county, upon said bonds, on March 1st., 1877, the "sum of seventy-two thousand, seven hundred and twenty-one "dollars and fifty-five cents, say $72,721.55.

"He further reports: That these bonds, being due by the "terms thereof, should the Court render a decree against the "county for so much money, in that case, in addition to the "surrender, by the defendant Morrison, of the bonds, $9,000, "held by him, there will still remain the two bonds, $1,000, "sold by him, and subsisting obligations against the county, "which, if he is unable to surrender to the county, are to be "considered; the amount due on said bonds, March 1st, 1877, "and interest on the coupons thereon, I computed and find to "be $1,580.80, for which sum there should be a decree against "him, and which would lessen the amount due from the county "just that sum.

"Leaving, in that case, due from the county.....$71,140.75
"I. L. Morrison,..... 1,580.80

"Total,..... $72,721.55

"I attach hereto and as a supplement, a statement showing in detail the method of my several computations and the re- "sult in each, as also the amount of deductions and credits, in "order that if the principal is incorrect or the execution faulty "the errors can easily be made apparent.

"Eighth. In response to the last direction, "as to whether "the defendant Henry E. Dummer and Morgan county, or

"either, are liable under the compromise in the Blair case for "any amount paid for William Thomas, or overpaid in said "compromise" he has to report, that, after carefully considering "the testimony upon that question, he is of opinion that neither "said Dummer or Morgan county are liable for any sum under "said compromise, or for or in any manner the same was set- "tled and adopted and paid.

"To turn the interest on coupons into seven per cent. take "interest on coupons as found by me and add 1-6 of same, viz:

"Interest on coupons:

"First amount found by me,.....	$2,422,80
"Second amount found by me,.....	5,419,90
"Third amount found by me,.....	7,795,80
	$15,638,50
Additional sum,.....	2,606,42

"The above sum of $2,606,42 will make the interest as "found by me on coupons equal to 7 per cent. per annum."

To the above report the county of Morgan filed exceptions which are substantially as follows:

First. Because he allowed interest on matured coupons from their maturity.

Second. Because he did not credit Morgan county with thirty five bonds with the coupons attached, under the "Vail and Ladd" decree.

Third. Because he did not credit the county with fifty-three bonds under the "Blair" decree, (rec. 90).

The complainants also filed exceptions to the report substantially as follows:

First. The interest on matured coupons should be at seven per centum instead of six per centum,—the coupons having been made payable in New York, where the legal rate is seven

per centum.

Second. The amounts paid Morrison & Epler for attorneys fees viz: $3,500, and $1,200, should not be allowed as a credit to the county, the same having been expended in attempting to defeat and conceal the bonds.

Third. The amounts paid by Morgan county, viz: $52.72 and $2,102 66, should not be allowed in her favor, the same having been expended in court costs, in attempting to defeat and conceal the bonds, (rec. 99).

On the 16th of July, 1877, the final decree was rendered, which is, in substance, as follows:

(The defendants, Morrison and the Peoria, Pekin & Jacksonville Railroad Company, having turned over to the county the $19,000 in bonds in their hands, and bonds Nos. 81 and 82 having passed into the hands of innocent parties) it was ordered:

First, That the bill be dismissed as to said Morrison, the Peoria, Pekin & Jacksonville Railroad Company, Henry E Dummer, (these parties being the only defendants, aside from Morgan county) and as to said two bonds.

Second, That the exceptions, on the part of both parties, be overruled, and the Master's report be approved.

Third, That the county of Morgan pay to complainants, within sixty days, the sum of $72,539.65, with six per cent. interest, per annum, until paid.

Lastly, That Morgan county pay the costs, except the Master's fees, (rec. 316).

The county of Morgan appealed, and the complainants took a cross appeal, (rec. 316).

ERRORS ASSIGNED.

The county assigns the following errors:

First, The Court erred in rendering a decree in favor of complainants.

Second, The Court erred in holding that the vote gave authority to subscribe, and to issue bonds.

Third, The Court erred in holding the legislature had the constitutional power to legalize the vote and subscription.

Fourth, The Court erred in holding that the agreement that the bonds should only be delivered for work done in the county was void.

Fifth, The Court erred in holding the county was not entitled to a credit for the bonds taken up under the "Vail and Ladd decree."

Sixth, The Court erred in holding the county was a trustee, and could not buy in the claims of Blair, et. al., and obtain the benefit of the purchase.

Seventh, The Court erred in holding that complainants were of that class of creditors that could avoid the agreement between the county and the railroad company.

Eighth, The Court erred in overruling the exceptions of the county to the special Master's report.

Ninth, The Court erred in allowing interest on the interest coupons, (rec. 319).

Complainants assign, as error, the overruling of their exceptions to special Master's report.

IV.

ARGUMENT.

For the sake of convenience we will take up first the errors assigned by the county of Morgan. The first error assigned includes all the rest.

Under the second error assigned it will be claimed that the vote was void, because the proposition was submitted to the voters to vote for or against subscription to three railroad corpora-

tions at one and the same time and by a single vote.

We deny that under such circumstances the bonds would be rendered void, especially under the circumstances in this case. Throughout the entire history of these bonds, and all the litigation that has arisen over them, down to the filing of the county's amended answer in September 1876,—over twenty years after the vote had been taken, this question was never raised by the county; in all of her answers and bills in all the litigation about the bonds she has conceded that the vote and issuance of the bonds were legal.

She canvassed the vote, declared that the same was legal and made the subscription; she ordered the bonds to be delivered and delivered them; she paid two sets of the coupons; has been trading with the bonds as valid obligations down to the filing of the bill in this case; she obtained $50,000 in the capital stock of the Railroad company in payment for the bonds and has held the same over twenty years; she appointed her agents to represent the stock in the elections of the company, and she was so represented.

By her conduct she enabled the railroad company to contract debts and obtain credit because of the bonds; she attempted to donate them to another railroad company and thereby procured many advantages.

She had it recited in the face of the bonds that they were "duly authorized by a majority of the qualified votes of the "county, * * and are issued by authority of a vote of the qual-"fied voters of said county taken in pursuance of law." (rec. 269.)

Can she now, after this great lapse of time come into a court of equity and say the bonds were void in the inception because of some irregularity in the manner of taking the vote?

These acts clearly evinced a recognition of the validity of the bonds on the part of the county, and she is estopped to deny their binding force. In the State of Illinois, the question is settled.

Johnson, vs. Stark County, 24 Ill., 75.

Clark, et. al., vs. Supervisors, 27 Ill., 305.

In the case of *Clark, et. al., vs. Supervisors, &c., supra*, the same point was distinctly made, and the same passed upon by the Court. The Court says.

"Now, in this case, there was no want of authority to order the election, but simply an erroneous mode of submitting the question. And we have no hesitation in saying that it was such a deviation from the correct mode, as may be rendered valid by subsequent acts, so as to protect the rights of third parties, which may have been subsequently acquired. Had the proceedings been instituted by any citizen of the county, to restrain the issue of these bonds, the relief would have been granted."

If the irregularity is only such as to avoid the liability upon the grounds of a non-compliance with the law in holding the election, it must be insisted upon before the rights of third parties have intervened.

Johnson vs. Stark County, supra.

Burr, et. al. vs. City of Carbondale, 76 Ill., 455,

and authorities cited. The validity of the bonds in question, has been affirmed three times by the Illinois Supreme Court.

Thomas et. al. vs. the County of Morgan, 39 Ill. 498.

Thomas vs. the County of Morgan, 59 Ill. 480.

Morgan County et. al. vs. Thomas et. al. 76 Ill. 120.

It is not a question of *power*, in this case, but solely one of *irregularity*. Under the decision of this Honorable Court, it seems that there can be no doubt but that the county is now

barred from attacking the validity of the bonds.

Bissell et. al. vs. City of Jeffersonville, 24 How. 287;
Supervisors vs. Schenck, 5 Wallace, 781;
Rodgers vs. Burlington, 3 Wal. 654;
Cooley on Taxation, 548; see also
Butler vs. Dunham, 27 Ill. 477;
Steins vs. County Court, 44 Mo., 201;
State vs. Van Horn, 7 Ohio, St. 331;
Wanamaker vs. Goshen Township, 14 Ohio, St. 587.

In the case of Bissell et. al. vs City of Jeffersonville, *supra*, the Court said:

"When the contract had been ratified and affirmed and the bonds issued and delivered to the railroad company in exchange for the stock, it was then too late to call in question the fact determined by the common council," viz: "That the proceedings in the election were regular."

Again the Court says: "The rule is clearly laid down that a corporation quite as much as an individual is held to a careful adherance to truth in their dealings with other parties and cannot by their representations or silence involve others in onerous engagements and then defeat the calculations and claims their own conduct has superinduced." We therefore say by the long line of acts ratifying the vadility of the vote it is now too late to raise the question. But aside from these questions of acquiesence, and ratification, the Legislature of Illinois in 1857, legalized the vote by the sixteenth section of "An act to amend the charter of the Illinois River Railroad Company," quoted in our statement of facts *supra*, and this brings us to the *Third* error assigned by Morgan county. It will be claimed that under Sec. 23 of art. 3 of the Constitution of 1848, the act is void, beause it does not conform to the requirement that "no private or local law, which may be passed by the General

Assembly shall embrace more than one subject and that shall be expressed in the title."

We think the construction placed upon this clause of the constitution by the Court of the State brings this section properly within the title.

Supervisors of Schuyler County vs People ex. rel. R. I. and Alton R. R. Co. 25 Ill. 181.

In which case the section complained of, was incorporated in an act entitled "an act to incorporate the Rock Island and Alton Railroad Company." "*Private Laws, 1855 p 305.*"

Belleville and Illinoistown Railroad Company vs. Gregory, et. al. 15 Ill. 20.

Judge Cooley says: "There has been a general disposition to construe the constitutional provisions liberally, rather than to embarrass legislation by a construction whose strictness is unnecessary to the accomplishment of the beneficial purposes for which it has been adopted." (*Cooley's Constitutional Limitations 146.*)

It may also be claimed that the section compells the county to incur a debt, and is, therefore, unconstitutional. This position is not tenable, we think, because the purpose of the section is merely to cure a defect. The Supreme Court of Illinois has never yet decided that the Legislature may not cure any defect, in the form or manner, of exercising an admitted right.

There is no dispute, in this case, that the County Court of Morgan county did constitute *the authority* of that county, and had the power to call an election. The true rule is laid down by Mr. Cooley, in his work on *Constitutional Limitations p. 371*:

"A retrospective statute curing defects in legal proceedings, "where they are of the nature of irregularities only, and do not

"extend to matters of jurisdiction, is not void on constitutional "grounds. Of this class are statutes to cure irregularities in "the assessment of property for taxation, and the levy of taxes "thereon; irregularities in the organization or elections of cor- "porations; irregularities in the votes or other actions by mu- "nicipal corporations or the like where a statutory power has "failed of due execution through carelessness of officers or oth- "er cause; irregular sessions of court, &c. * * * We know "of no better rule to apply to cases of this description than "this: If the thing wanting, or which failed to be done, and "which constitutes the defect in the proceedings, is something "which the Legislature might have dispensed with the necess- "ity of by prior statute, then a subsequent statute dispensing "with it retrospectively must be sustained. And so, if the de- "fect consists in doing something which the Legislature might "have made immaterial by prior law, it may also be made im- "material by subsequent law."

Even if the Supreme Court of the State had determined that such a curative act was void, it would not be authority in this case.

That Court, long ago, laid down rules on this subject, which were accepted and adopted by the Supreme Court of the United States. In St. Joseph Township vs. Rogers, a case from Illinois, this very question was presented and passed upon.

Justice Clifford, in rendering the decision, says:

"Argument to show that defective subscriptions may, in "many cases, be ratified, when the legislature could have origi- "nally conferred the powers, is certainly unnecessary, as the "question is authoritatively settled by decisions of the Su- "preme Court of the State." (16 *Wallace*, 663). Reference is there made to

Corgil vs Long.

Keithsburg vs. Frick,
Thompson vs Lee County, 31 Wallace, 327,
City vs. Lampson, 9th Wallace, 477,
Watson vs. Mercer, 8 Peters 111, and
Bissell vs. Jeffersonville, 24 Howard, 295.

The Supreme Courts of the State, and of the United States, having both repeatedly determined that where the legislature might originally confer the power, it might ratify the exercise of such power by subsequent legislation, it is too late now to say that the State Judiciary has changed its opinion.

Gelpcke vs Dubuque, 1st Wallace, 220.

But the State Court has not attempted to do so. The Silliman cases (*61 Ill., 218*, and *62 Ill., 170*,) themselves proceed upon the distinction which all the authorities point out, and can only be sustained by the peculiar facts disclosed, viz:—That the legislature had no power, in the first instance, to empower less than all the township authorities to create the debt, or impose the tax. However, we regard it as immaterial, whether the legislature ever passed, or attempted to pass the statute, and therefore regard this error, if any, as wholly immaterial, for the reasons that prior to the passage of the statute, the county had affirmed the legality of the vote by canvassing the same, declaring it legal, making her subscription for the stock, receiving the stock, appointing her County Judge to represent the county, as a stock holder, and directing him to provide for the issuing and delivery of the bonds. Therefore, the county, by her acts of ratification as above mentioned, has confirmed the validity of the bonds. But not only by these prior acts did she make the obligations binding, but since then she has repeatedly confirmed their validity by acts of ratification, as clearly shown by the evidence.

The fourth assignment of error raises the question of the

conditional delivery, the alleged condition being that the bonds should be paid out only for work done in the county.

It is claimed on the part of the county that its officers delivered the bonds to Elliott & Brown upon the above condition. To prove that the bonds were so conditionally delivered, the burden certainly rests on the county, because the bonds were found in the possession of Elliott & Brown, bankers, for the railroad company; the county had voted for the issuance of the bonds without condition; the county authorities had ordered them delivered without any condition; the county had received the stock without any condition, and we find the bonds and coupons in the possession of these agents of the railroad company with nothing in the record showing any condition. The sole and only evidence in this record in support of the position that there was such a conditional delivery, is that of Berdan, (rec. 119 to 121) who was County Judge at the time of the delivery of the bonds, he says: "It was understood and agreed by the County Judge and R. S. Thomas representing the company, that the bonds were only to be issued, paid out and used for work actually done on said railroad in Morgan county, * * * said condition was communicated to the depositaries; I think it was a verbal agreement or understanding; it was to be placed on record."

On cross examination he says: "I suppose the custodians would know from the County Judge, when, to whom and in what amounts to pay out the bonds,—there was nothing stipulated about it, but I suppose we talked about it and all other matters connected with the bonds. *I don't know that we made any specific direction or order that the bonds should not be delivered by the custodians only for work done in the county*, but the bonds were filled up in Elliott & Brown's office and they knew all about it. * * * Thomas was informed

of this arrangement by myself and I suppose by Elliott & Brown too; during my term of office he made no objection to it, and as I understood it assented to it, *at any rate, he made no complaint.*

Elliott emphatically says: That there was no condition attached to the delivery of the bonds; that the bonds were left with Elliott & Brown, by Judge Berdan, with verbal instructions to deliver the same to the railroad company, upon the receipt of the railroad company's certificate of stock, in favor of Morgan county, to the amount of the bonds, (rec. 106-110 and 274-277).

Now, Elliott is corroborated by a letter written by Brown, (his partner) about the time the bonds were delivered to them to the secretary of the railroad company, in which they say that the Court ordered the bonds to be delivered to the order of the board of directors of the railroad company, upon the receipt of the certificate of stock; and in that letter they certify that they hold the bonds subject to the order of such board of directors, (rec. 135).

Elliott & Brown are also sustained by the order of the County Court, which decrees that the bonds be delivered to the railroad company without condition, (rec 217). From all this evidence, we think it clearly appears that there was no condition attached to the delivery. The only other conclusion that can be reached being that Thomas told the Court, and others, that he had let the contract for the grading of the road through the county, and that it was stipulated in the contract that the bonds were to be used only to pay for such contract work.

In the case of Thomas et. al. vs. the county of Morgan, *39 Ill., 496*, the Court holds that the evidence sustained the position that there was a conditional delivery. But it will be

observed that the evidence in that case is much stronger for the county than in this case. No certificate from Thomas is produced in this case; but one of the members of the court here testify, while in that case, two testified. But suppose the facts justify the position that the bonds were delivered upon conditions In the subsequent case of Thomas vs. county of Morgan, et. al., *39 Ill., 479*, the Court puts a construction upon the stipulation, and says:

"The stipulation must be construed with reference to its ob-
"jects and substance. The object was to secure the road in
"Morgan county Had the company built the road out of its
"general assets, it is very certain they could have demanded
"the bonds. The sense of the stipulation is not that these
"identical bonds shall pay for work done in Morgan county,
"but it is if work is done in the county, the bonds shall be de-
"livered. The fact that the road has been completed from Vir-
"ginia to Jacksonville, is a substantial performance of the con-
"dition on which the bonds were issued."

In the case of Morgan county, et. al vs Thomas et al., 76 Ill. 121, where the court very thoroughly reviews the two cases above, and very carefully lays down the legal principles governing the case, decides: That the evidence shows that the bonds were actually delivered to the company; and the learned Judge at some length comments on the evidence, and gives the views of the entire bench in support of their conclusion; that the evidence is insufficient to support the theory of a conditional delivery.

But assuming there was a stipulation as contended, the court in the same case says:

"The subscription which the county court was authorized to
"make for capital stock in the Illinois River Railroad Com-
"pany by the vote of the people, and the subsequent enactment

"of the Legislature, was not conditional, but absolute, and the "subscription made pursuant to this authority was uncondi- "tional. It was made prior to any issue of bonds, and when "made, the contract between the county on the one side and "the railroad company on the other, was complete. The coun- "ty was then legally bound to issue and deliver its bonds to the "company in conformity with the terms of its subscription, and "upon its doing so, the company was bound to deliver to the "county the requisite certificate showing that it was the owner "of the number of shares subscribed for in its capital stock.

"This claim for unpaid subscription then became a part of "the assets of the company. The subscription being absolute "in its terms, and therefore constituting a part of the assets "of the company, R. S. Thomas had no authority simply as "president of the company to consent that it should become "conditional; nor could the county make such claim as a matter of right, * * * * * * * When the contract "between Allen & McGrady and the railroad company was "made, no bonds had been issued, and the county stood bound "by the terms of its subscription to deliver them to the com- "pany without any condition. * * * The county's obliga- "tions were fixed and known; the company was entitled to "have the bonds, and whether it made conditional or absolute "contracts on the faith of them, was a matter to be solely de- "termined by it, and in which the county had no other con- "cern than that of any other stock holder."

See also *Henry vs. The Vermillion and Ashland Railway Co., 17 Ohio, 187.*

Mieys vs. I. & M. T. Co. 11 Ohio, 273.

First Redfield on Railways, (3d edition) 170.

Morris, Admr et. al. vs. Cheney 51 Ill 451.

But supposing there was a conditional delivery.

From each of the above three cases, it appears that we are wholly unaffected by any such stipulation. In the case in the *39 Ill., supra*, the Court holds that as Vail and Ladd were judgment creditors of the company, and did not know of the condition, the condition was void, as to them, and the bonds were assets, to which they could resort for payment.

In the case in the *59th Ill., supra*, the facts were, that the company had employed Allen & McGrady to construct the work in Morgan county, and they were to receive their pay in the bonds; the company became insolvent, Allen & McGrady had not done any work in Morgan county, but had done work in other counties, they and the company settled, and the company gave them orders for $4,000 of the bonds. This order they assigned to William Thomas, the appellant. The Court says the bonds are liable to pay the orders, as "there "is great propriety that this fund should be appropriated to "the discharge of the liabilities of the defunct organization." And in the *76 Ill., supra*, it is laid down broadly *that the bonds are a trust fund, to be held for the payment of the debts of the defunct company, and that the county, as a stockholder in the company, is interested in the preservation of its assets, and their appropriation to the payment of its debts.* We therefore say the fourth assignment of error is not sustained.

The fifth and sixth errors assigned, question the action of the lower Court in holding that the county was not entitled to a credit for more than she actually paid out under the decrees in the "Vail & Ladd" and "Blair" cases.

The bonds and coupons were a trust fund, and the county was a trustee to manage such fund in good faith, for the best interest of the creditors of the defunct railroad company.

In each of the three cases before the Supreme Court of Illinois above referred to, the court holds that the bonds and

coupons constitute a trust fund for the benefit of the creditors of the defunct railroad company. The Court, in the case of Morgan county, et. al. vs, Thomas, et. al., *supra*, (it being the case that the solicitors for Morgan county were so desirous of having decided, alleging, as a reason, that the principles that would govern this case would there be settled) unequivocally declares that the bonds are a trust fund; that the county is the trustee, and that she is bound to see that they are properly, and in good faith, appropriated to the payment of the creditors of the defunct railroad company.

That the assets of a defunct railroad company are a TRUST FUND for the security of its creditors, and that a stock holder in such corporation is bound to see that such assets are in good faith appropriated to the payment of the company's debts. These are established principles and are fully declared in all the leading text books and in many well considered cases.

Sawyer vs Hoag, 17 Wallace 610.
Sawyer vs Upton 1st Otto, 60.
Curren vs Arkansas 15 Howard, 304.
Michaud vs Girod, 4 Howard, 503.
Manna vs Potomac Co. 8 Peters, 281.
Wood vs Dummer, 3 Mason 308.
Lawrence vs Nelson, 21, New York, 158.
G. C. & S. R. R. Co., vs Kelley, et al. 77 Ill. 434.
Vose vs Grant, 15 Mass. 505, 517, and 518.
Nathan vs Whitlock, 3 Edward Chancery, 215.
McClaren vs Pennington, 1 Paige 108.
Lang vs Penn. Insurance Co., 6 Penn. St. 421.
1st. Vol. Redfield on Railways 4 ed 169.
2nd Story Eq Jur. 9 ed. Sec. 1252.
3rd Redfield on Railways, 4 ed 542 n 12.
Perry on Trusts, Sec. 242.

In the above authorities it is clearly settled that no devices will be permitted, no shift allowed, however artfully planned and executed, to avoid the actual and *bona fide* payment of the subscription to the stock of a defunct corporation.

We insist that in the "*Vail & Ladd*," and "*Blair*" cases the county was not only guilty of a *constructive*, but an *actual* and deliberate fraud.

In the "*Vail & Ladd*" case, the county paid Vail & Ladd the amount of their claims, in money, with the understanding, with the solicitors for Vail and Ladd, that she could protect herself, so far as the bonds were concerned, in any way she thought proper; accordingly, the solicitor for the county drew the decree, fixing the value of the bonds at forty cents on the dollar, and this, too, without taking into consideration the coupons attached. This was done without hearing any evidence as to the value—the solicitors for Vail and Ladd paying no attention whatever to the decree. The county, under the decree, not only took up $17,500 in bonds, but also $6,300 in matured coupons attached to the bonds, and worth par, and this, too, in the face of the fact that the matured coupons on the bonds then in the hands of M. P. Ayers & Co., amounted to about $17,000, without interest on the same.

Why was this scheme planned and proposed by the county, and finally consummated?

Let the county's agent and Judge answer:

"To get as many of the bonds out of the way as possible, "not knowing but that there might be other litigation about "them. *This was the object on the part of the county.*" Can such motives, on the part of a trustee, holding a fund in trust for others, be regarded in any other light than fraudulent? Instead of doing her duty in the preservation of the fund for those entitled to the same, she is deliberately and artfully

scheming to conceal and destroy the fund for her own benefit and against the rights and interests of the creditors.

In the "*Blair*" case, we find her conduct more culpable. Here she buys in a lot of claims (the validity of which she challenges only two days before) for $12,000; for what purpose? Again let the county's agent and Judge answer:

"To hurry the matter through, and get a final decree before "the commencement of the January term of the United States "Circuit Court at Springfield, so as to use that decree in de- "feating that suit in the United States Circuit Court." The suit in the United States Court was instituted by Studwell, Hopkins and Cobb, as trustees, to reach these bonds as assets of the railroad company, to apply on their judgment before mentioned. Here we find the county secretly and cunningly conspiring to cheat the parties representing those most deeply interested in the trust fund. Their scheme is carried out.—They go to Springfield and present the decree. Studwell, Hopkins and Cobb, not knowing of the fraudulent plot that had been carried to success against them, dismissed their bill. Here the trustee, by paying $12,000, secretly attempts to gain $45,000, not counting interest on matured coupons, and this, too, when the county then owed, in matured coupons, a much larger amount than was paid. Can a trustee, by such corrupt means, drive the parties for whom she is acting from a court of justice, and profit by such conduct?

But, throwing aside the question of actual fraud, and supposing the county acted in good faith, she, at the most, is only entitled to a credit for what she actually paid out in the "*Vail & Ladd*" case, and nothing for what she paid out in the "*Blair*" case had not the appellees seen fit to offer to do more than equity in allowing her a credit for what she actually paid out, viz: the $12,600. In the case of Thomas, in 59 *Ill.* 489,

the Court said that the surrender of the surplus bonds, under the decree in the "*Blair*" case, was "a wasting and misappropriation of the fund which a Court of Equity can, and "ought to, correct."

Whether a debtor can purchase the paper of his insolvent creditor, who is a natural person, and thus set off that paper against the debt, is not at all the question here.

Can a shareholder of a corporation make such a purchase, and avail himself of it as against his unpaid stock subscription? is the present inquiry. Had the judgment of Ladd and Vail, and of Blair, and others, been valid and *bona fide*, in every respect, it does not follow that any agreement by which the bonds were sacrificed, would stand for a moment. The county, and all persons whatever, had full notice that the assets of the railroad company constituted a trust fund. The trust character being impressed upon it, the trustee could not lawfully waste it.

Adams on Equity, side page, 165.

The Supreme Court of the United States, in the case of Sawyer vs Upton, *First Otto*, *p*60, speaks plainly on this proposition. It says, speaking of such a fund:

"If diverted, they may follow it as far as it can be traced, "and subject it to the payment of their claims, except as "against holders who have taken it, *bona fide*, for a valuable "consideration, without notice."

But we go farther than we have yet gone in claiming this fund. We aver that, if Morgan county had absolutely owned these judgments in favor of Ladd and Vail, and Blair, and others, before the insolvency of the railroad company, and if these judgments were in all respects valid, the county could not set them off against its own subscription.

For a stronger reason, it could not, either with or without

the consent of the company, purchase these judgments after the company had become insolvent, and then set them off against its subscription. And what the county could not do in open court, by way of defence, it could not do by a secret and fraudulent arrangement with one set of creditors, with intent to defeat the just claims of others.

This is not an open question. In Sawyer vs. Hoag, assignee, 17 *Wallace*, *supra*, the Supreme Court of the United States broadly lays down the doctrine that in a suit against a stockholder, on his subscription, he cannot set off a debt due him from the corporation. What he owes is a trust fund for all the creditors. What the corporation owes him, is a claim which can only be satisfied, *pro rata*, with the claims of other creditors. We quote from the head notes of the case which truly state its effect :

"Capital stock, or shares of a corporation—especially the "unpaid subscription to such stock, or shares—constitute a "trust fund for the benefit of the general creditors of the cor- "poration."

"A stockholder indebted to an insolvent corporation for un- "paid shares, cannot set off against this trust fund for credit- "ors a debt due from the corporation. The fund arising from "such unpaid shares, must be equally divided among all the creditors."

"The relations of the stockholder to the corporation, and to "the public who deal with the latter, are such as to require "good faith, and fair dealing, in every transaction between him "and the corporation of which he is a part owner and controller, "which may injuriously affect the rights of creditors, or of "the general public; and a rigid scrutiny will be made into "all such transactions, in the interest of creditors."

Had the county actually owned the judgment before the

company became insolvent, it could not set them off afterwards; much less could it buy them in, or pretend to discharge them, at a large discount, and thereby acquire a counter claim, equal to the nominal value of what it purchased.

In a still more recent case, the Supreme Court of the United States has declared the same doctrine. J. Y. Scammon filed his bill in the United States Circuit Court, for the Northern District of Illinois, against the Mutual Insurance Company, praying to have certain notes which he had given that company for his subscription to its capital stock returned to him. He was indebted to said company, on said notes, and also for a large sum of money deposited with him as a private banker

The company was heavily indebted to him on policies of insurance for losses by the great fire in Chicago, and as the company was insolvent, he desired to set off, in equity, what the company owed him, against what he owed the company on subscription, and for money deposited. The Circuit Court dismissed the bill, and Scammon appealed.

The Supreme Court of the United States reversed the decision below in part. It held that Scammon had a right to set off his claims for losses against what he owed the company on the deposit account, but could not set off any claim against what he owed on his subscription.

The case of Sawyer, vs. Hoag, was reaffirmed. From all this it is clear that if Morgan county acquired any right by its transactions with Vail and Ladd, and Blair and others, it was only to the extent of what it actually paid, and properly paid. It could not speculate in the trust fund, or pay five dollars of its subscription to the railroad company with one dollar in money. It could not conclude other creditors by agreeing to admit unjust, or questionable claims against the rail-

road company, for the purpose of buying those claims at a small part of their nominal amount, and then obtain a credit on its subscription for several times the amount so paid. As the Supreme Court of the United States says: "Equity will "make rigid scrutiny into such transactions by stockholders "in the interest of creditors."

We repeat: The county cannot set up payment, except so far as it was real, and not colorable, and as to set off, that, as we have shown, can not be set up at all. It was the duty of the county to pay its debt, then due, and not to sacrifice its own promises to pay at any discount.

It was not for the county to agree, or stipulate, that, instead of paying its own indebtedness, the funds of the railroad company should be squandered and wasted.

So far as the county made a profit out of these transactions, or speculated in its own obligations, such profit must be accounted for to those who have a right to rely on the trust fund. Whoever deals with such a fund knowingly, must account to those who are entitled thereto. We need not cite authorities in support of this fundamental principle.

She cannot claim a credit in the "*Vail and Ladd*" case for more than she actually paid out, and in the "*Blair*" case, had not the appellees seen fit to give her credit for the $12,000 we cannot see how she would be entitled to a credit for that.

It appears that Mr. Prettyman was vice president of the railroad company, but for that reason he had no power, by virtue of his office, to enter the appearance of the defunct railroad company, and we contend that all the judgments mentioned in the "*Blair*" suit, based upon the action of Mr. Prettyman, in attempting to enter the company's appearance, were void, even if the railroad company then had any existence.

But the railroad company had no existence at that time; it was dissolved.

Thomas et. al. vs. Morgan County, 59 Ill., supra.

Thomas vs. Morgan County, 76 Ill., supra.

The character of these claims, and the manner of their settlement, all support the position that the *real* transaction was a release of all these demands, for $12,000; and that the county submitted to the terms mentioned, in order to defeat the complainants, or their trustees, and prevent them from successfully asserting their rights in an equitable fund in the suit then pending in the United States Circuit Court.

All the claims, then, set up in the "*Blair*" suit not based on service of process, stand precisely as if no attempt had been made to put them in judgment. The claim of Henry T Thomas, administrator, was barred by the decree in the case of Thomas et. al., vs. Morgan County, et. al., *59 Ill., 496, supra.*

The claim of Mr. Low, as well as several others, was barred by the statute of limitation. Had the railroad company had any existence at that time, it could have successfully interposed a defense to such as were cut off by time. Can the county of Morgan, and Blair, et. al., waive the rights of the railroad company? Can the county of Morgan disregard the rights of all the creditors of the railroad company not parties to the "*Blair*" suit, and speculate in this way? We insist that this cannot be done. We insist that the $12.00, paid by Morgan County was a voluntary payment.

In the case of Spear vs. Dey, *5 Wis. R. 193*, an effort was made to set off, in equity, payments alleged to have been made, but the Court refused the relief, and said:

"Suppose he had voluntarily paid the personal debts of the "complainant, would it be right to allow him to set off the

"amount, thus paid, without regard to equities that might ex-"ist between the complainant and his creditors? In this case "it might lead to great injustice, to permit him to make the "set off. They may have good defences against some of these "very debts paid by appellants." See, also,

Waterman on set-off, 426.

The railroad company had a valid defense to the several demands based on open accounts—that of limitation. This defense was a personal privilege, and could not be waived by any one except the party having that right. The County could not waive it.

Angel Limit, *p* 301, *sec.* 284, *note* 4.

The debt of Henry T. Thomas, administrator, was not a demand that could be enforced against this fund. It had been so finally determined by the Supreme Court of the State, at the instance of the county, prior to the time she paid for the release.

Thomas ex. Morgan County, 39 *Ill.*, *supra*.

It follows, then, that the appellees, with other creditors, were entitled to this fund, to the exclusion of Henry T. Thomas, because he was in such a position that his intestate could not be held to have relied on this fund for payment. Could then, the county, so act as to bind any creditor not a party to the "*Blair*" suit, and profit by the act? Could she waive the defense she had, and speculate with the fund to the injury of appellees? She was a trustee, as before stated, and all the equities of appellees existed before this decree was rendered, and the county had notice of the same. She, then, strictly speaking, had no right to pay anything whatever on this claim of Thomas, administrator, and have it allowed in accounting for this fund. She did pay within a fraction of $8,000 for the release of this demand. Upon equitable principles, this was

wrongfully paid, and she is not entitled to credit for it, because she had notice that the fund was not burdened with any trust, as to this Thomas claim.

She was not justified in making the payment, but appellees were willing to do complete equity, and inasmuch as it is to be presumed that the claim was a *bona fide* one, and the county had, in fact, paid this sum, this bill was filed in the Court below upon the theory that she should be compensated for money actually paid in the "*Blair*" case, and no more.—In this case, more than such compensation would be inequitable. Why should the debts of the Illinois River Railroad Company remain unsatisfied, and at the same time a stockholder in, and a debtor to the same, withhold payment? If this can be done, it must be upon principles of equity law.—These demands could not be set off at law. If done at all, it must be because equity will support the demand; or, rather, because equity demands the interposition of the court to protect the rights of the county.

"We speak familiarly of equitable set off, as distinguished "from set off at law; but it will be found that this equitable "set off exists in cases where the party seeking the benefits of "it can show some equitable ground for being protected against "his adversary's demands."

Lord Cutlerham, in Rowson, vs. Samuel T. Craig & Phil., 161.

The utmost limit that the facts in this case can possibly demand of the Court to go, on this point, is to give the county credit for for $12,000, in fact paid, and no more. We, therefore, think there was no error in these two assignments.

The seventh error assigned, raises the question whether the complainants are of the class of creditors who can resort to the bonds for payment, as against the rights of the county—

between it and the railroad company, to withhold payment of its subscription, on the ground that the company had never performed its contract to build its railroad in the county.

We regard this assignment as wholly groundless, because we think we have clearly established that the bonds were deliverable, and delivered, without any condition; but granting there was such a condition, the complainants are of a class of creditors who can resort to this fund.

It is a principle of law too well settled to require the citation of authorities, that the bonds issued by the Illinois River Railroad Company, and secured by its trust deed to Studwell and others, as trustees, constituted the prineipal of the debt, and the trust deed was simply an incident to the same. The owners of the bonds held an indebtedness against the company upon which they could sue at common law, or, if they saw fit, could invoke the aid of a Court of Chancery in the foreclosure of the trust deed; in which case, if the mortgaged property did not bring the debt, a judgment could be rendered against the company for the deficiency.

Now, in this case, the complainants, in April or May, 1862, became the owners of the principal of the debt, to near the amount of $900,000; therefore they became the creditors of the company to that extent, having all the rights of a general creditor, and the additional right of subjecting the mortgaged property to sale, for the purpose of realizing what they could out of such property, and, in the event of the property not bringing the amount of the debt, they were entitled to a judgment for the balance.

The fact that they held a trust deed, did not lessen their right, as holders of the bonds of the railroad company, to resort to any other property or assets of the company for payment; on the contrary, it is a strong point in their favor.—

The record shows that the subscription to the stock of the railroad company was intended to be used in producing a railroad, which, when produced, was to pass under their mortgage; all the world had notice that these very bonds of Morgan county, were intended to create property, pledged to them in preference to all others. In fact, complainants had good reason to believe that the bonds did pass to them under the mortgage, and it was litigation on that question which delayed proceedings so long. Complainants, as the record in the case in 76 *Ill.*, *p* 120, *supra*, shows, bought under the mortgage, and completed the road. When the Supreme Court determined that the bonds of Morgan county did not pass under the mortgage, but belonged to the general creditors of the railroad company, this still recognized the rights of complainants, who are jus such creditors.

It cannot be presumed, legitimately, that the purchasers of the bonds of the railroad company wholly relied upon the mortgaged property for payment; they had a right to, and undoubtedly did, take into consideration, when they purchased the bonds, the subscriptions to the capital stock of the company, as well as all other resources of the company, as a basis of the value of the bonds.

They not only purchased an equitable interest in the mortgaged property, but also an equitable interest in all the assets and resources of the company. It cannot be affirmed, in this case, that either Studwell, et. al., as trustees, or the complainants, at the time they acquired an interest in the bonds of the company, had any notice of any such pretended conditional subscription.

The Supreme Court of Illinois has settled the question in the case in 39 *Illinois*, *supra*. The Court says, in reference to the claim of Vail and Ladd:

"They are creditors of the company for ties furnished, and "having exhausted their legal remedies, ask the aid of the "Court in reaching these equitable assets They are in no "wise chargeable with notice of the condition upon which these "bonds were issued by the county. They only knew that the "county had subscribed to the stock, and issued its bonds.— "Any agreement, or understanding, between the company and "the county, of which they had no knowledge, and the effect of "which would be to place these bonds beyond their reach, as "creditors, would be fraudulent, as to them." The county "subscription, and the absolute order of the county court "directing the issue and delivery of the bonds, may have in- "duced them to give credit to the company."

Now while the Vail and Ladd judgments were for ties for the company, these bonds of the railroad company were issued for the purchase of iron and other material for the construction of the road. (rec. 220).

In the case in the 59 Illinois *supra*, Thomas did not have a judgment, but was simply the assignee of two orders for $4000, of the bonds of the county,—the orders having been issued for work done by Allen & McGrady not in Morgan county. And in the case in the 76 Ill. *supra*, the court decides that the bonds of the county are assets for all the creditors of the company, and affirm the claims of Schooley and West declaring that they are such creditors as are entitled to the bonds.

"The claim of Schooley, set up in his cross-bill, is for ser- "vices rendered by him as secretary of the Illinois River Rail- "road Company, for which he received orders drawn by R. S. "Thomas, president, on the treasurer of the company. Three "dated December 3d, 1860, two for $100 each, and one for $57- "05, and one April 7th 1862, for $200, all bearing ten per cent. "per annum interest from date." "West's claim, as presented

"by his cross bill, is for $69.63, as evidenced by a due bill "signed by the Illinois River Railroad company, by R. S. "Thomas its president, dated on the 4th of January 1869, and "bearing interest at the rate of ten per cent, per annum."

These bonds of the county are assets of the company for all its creditors; and these complainants first became some of such creditors, in 1862, and afterwards, became judgment creditors; we, therefore, say this assignment is not well taken.

The eighth error assigned is the overruling of the county's exceptions to the special Master's report; all these exceptions are raised by the errors assigned, and have, heretofore, been discussed.

The ninth error is, "The court erred in rendering a decree for interest on the interest coupons."

This subscription was made under an act of the General Assembly of the State of Illinois, entitled, "An act supplemen- "tal to an act entitled, 'An act to provide for a general system "of railroad incorporations,'" in force Nov. 6, 1849, (*Laws of* 1849, *page* 33), the second section of which provides :

"That for the payment of said stock, the Judges of the "County Court of the county, or the common council of the "city making such subscription, or purchase, are hereby au- "thorized to borrow money at a rate not exceeding ten per cent. "per annum, and to pledge the faith of the county or city for "the annual payment of the interest, and the ultimate redemp- "tion of the principal; or if the said Judges or common "council should deem it most advisable, they are hereby au- "thorized to pay for such subscription, or purchase, in bonds "of the city or county making such subscription, to be drawn "for that purchase, in sums not less than fifty dollars, bearing "interest not exceeding ten per centum per annum. *Provi-*

"*Ind.* That no bond shall be paid out at a less rate than par "value."

Under the vote taken in Morgan county, the bonds were issued, with coupons, representing six per cent. interest, and the bonds and coupons were made payable at the American Exchange Bank, in the city of New York, (rec. 269 and 270).

What is the nature of a coupon? says this Court, in the case of Aurora City vs. West, 7 *Wallace*, 105:

"Bonds and coupons like these by univeral usage and con- "sent, have all the qualities of commercial paper. Coupons "are written contracts for the payment of a definite sum of "money, on a given day, and being drawn and executed in a "form and mode for the very purpose that they may be sepa- "rated from the bonds, it is held that they are negotiable, and "that a suit may be maintained on them, without the necessity "of producing the bonds to which they were attached.

"Interest, as a general rule, is due on a debt from the time "that payment is unjustly refused, but a demand is not neces- "sary on a bill or note payable on a given day.

"Being written contracts for the payment of money, and ne- "gotiable because payable to bearer and passing from hand to "hand, as other negotiable instruments, it is quite apparent on "general principles that they should draw interest after pay- "ment of the principal in unjustly neglected or refused."

"Where there is a contract to pay money on a day fixed and "the contract is broken, interest, as a general rule, is allowed, "and that rule is universal in respect to bills and notes payable "on time. Governed by that rule this court in the case of "Gelpcke vs Dubuque, held that the plaintiff, in a case entirely "analogous, was entitled to recover interest."

And the Court says in the case of Gelpcke vs Dubuque, 1 *Wallace*, 206: "Bonds and coupons, like these, by universal

"commercial usage and consent, have all the qualities of com "mercial paper. 'If the plaintiff's recover in this case, they "will be entitled to the amount specified in the coupons, with "interest and exchange as claimed.' "

"And as said by Mr. Justice Grier, while on the circuit in Pennsylvania: "It is useless to bring forward here, as against " the business operations of this day, abstract dogmas out of "Blackstone and the institutes of Coke, such instruments as "these were never dreamed of in their day; the laws of trade "suggest and govern these matters."

3 Wall. Jr. 272.

The nature of coupons being such, the courts have held that matured coupons are entitled to payment in preference to the principal or bond to which they belong.

Very recently, (Sept. 1879), in the United States Circuit Court for the Southern District of Illinois in the case of Malcom C. Turner, et. al. vs The Indianapolis, Bloomington & Western Railway Company, their Honors John M. Harlan and Samuel H. Treat so held. So far as we have been able to learn, it has been the universal rule in the United States Courts held in Illinois as well as in this Court, that matured coupons draw interest after maturity.

Town of Geneva, vs. Woodruff, et. al. 2 Otto, 502.

Gelpcke, et. al. vs. The City of Dubuque, 1 Wallace, 175.

Thompson vs Lee County, 3 Wallace 327.

Commissioners of Knox Co., Ind. vs. Aspinwall, et al. 21 Howard, 539.

Here then, is a law authorizing the payment of interest annually—the coupons representing such interest are so issued.

The nature of such instruments having been so pronounced, and this honorable Court having held that such instruments

draw interest from maturity, why then should not these coupons so draw interest?

It will be urged on the part of the county, that the Supreme Court of Illinois has decided that such coupons do not draw interest.

In the first case before that Court, Madison county et. al. vs Bartlett, *1 Scam. 67*, the only question presented was: "Is "a county bound to pay interest on county orders from the day "of their issuing until paid?"

The orders were drawn as follows:

"September term of the Commissioners Court, 1822. Or- "dered that David Sweet be allowed $8 for eight days atten "dance as constable, upon the circuit court of Madison county "at May term 1820, as per order of the circuit court. Attest, "Joseph Conway, Clerk."

"December term of the commissioners court for Madison "county, 1825; ordered that William Moore be allowed the "sum of one dollar, or its equivalent, in State paper, for servi- "ces as a judge of a special election last month, as per voucher "filed. Attest Hail Mason, clerk."

The Court says: "These orders are a mere liquidation of "the sum due on a settlement of accounts against the county, "but without fixing any time for payment. They are, therefore, "only to be considered as an authority for the holder to receive "the money whenever it is in the county treasury. To remedy "this defect of the common law, interest is given, by statute, "in certain specified cases, from the time that the debt becomes "due, until payment is actually made. Hence, the statute in- "terest may properly be defined to be the legal damages, or pen- "alty, for the unjust detention of money. From this view of "the subject it will appear that in the greater part of the "cases where counties contract debts, and issue their orders

"for payment or compensation, the probability of delay, or "uncertainty in the time of payment, has been estimated in the "enhanced price agreed on for the services, work or materials "contracted for. In all such cases, then, it would be mani- "festly improper to allow interest; for interest, by statute, is "allowed as damages for the unjust detention of money; and "here these damages have been considered by the parties in "the extra price agreed on."

In the case of the city of Pekin vs. Reynolds, 31 *Ill.*, 529, the plaintiff had sued on a coupon similar to the ones issued by Morgan county, and, by its terms, was payable at the American Exchange Bank, in the city of New York. The Court held interest could not be recovered on the same; and it based its opinion on three grounds:

First, That in the absence of statutory authority, the municipality could not bind itself to pay its indebtedness at any other place than its treasury, and such being the case, it was not bound to seek its creditor, and until the creditor demanded payment at the treasury, he could not recover interest.

Second, For the reasons given in the case of Madison County, et. al., vs. Bartlett, *supra*.

Third, That at common law, interest was allowed in no case, and under the Illinois Statutes, relating to interest, counties are not included.

But we insist that the reasons above given, do not exist in this case.

By act of the General Assembly of Illinois, entitled, "An "act to futher amend the charter of the Illinois River Railroad "Company," approved February 14th. 1859, (Pri. Laws of 1859 page 457.) the principal and interest of these bonds and coupons were made payable in New York as stipulated in the bonds and coupons.

The third section of that act is as follows.

"In all cases where the principal or interest of any county, "city or town bonds, issued to said company by virtue of a "vote of the legal voters of such county, city or town, has been "or shall be made payable in the City of New York, such "bonds shall not on that account be deemed invalid, but the "principal and interest shall be deemed payable as specified in "such bonds."

Such legislation is countenanced, and the reasons given for the same, in Spurk, et. al. vs. Croak, et. al. 19 Ill. 415. It was the duty of the county to levy a sufficient tax to pay the interest. Section seven of "An act to amend the charter of the Illinois River Railroad Company," in force January 29th 1857, (*Pri. Laws*, 1857, *p* 105,) provides: "In all cases where "subscriptions of stock have been or shall be made to said "company by any county, in pursuance of a vote of the county "it shall be the duty of the county court of each county re- "spectively, to levy a sufficient tax to pay the interest on the "bonds to be issued for said stock; which tax shall remain in "force until said bonds shall be paid off and discharged; and "said tax may, from time to time, be increased or diminished, "so as to produce sufficient funds for the payment of the in- "terest.

Now, what were the duties of the county, under these circumstances? She was bound to levy a sufficient tax to pay the interest as it became due, and she was bound to pay, or offer to pay, such interest as it became due, at the American Exchange Bank, in the city of New York. No demand of payment, on the part of the owners of the bonds or coupons, was necessary, and if the county desired to avoid paying interest on her matured coupons, she could have offered to pay the same at the place specified.

The Supreme Courts of Illinois and the United States have settled this question. In the case of Yeaton,et. al., vs. Berney, 62 *Ill., page* 62, the Court says :

"These notes were made payable at a specified time and "place. It was not necessary for Berney, the payee, to make a "demand of payment at the time and place specified, in order "to maintain an action upon the notes, or a bill to foreclose "the mortgage.

Butterfield, vs. Kinzie, 1 *Scam.* 445.

"But if the makers, or any of them, were at the place at the "time designated, and were ready, and offered to pay the money, "and could not pay it because the notes were not there to be "surrendered up, such readiness and offer would have dis-"charged them from liability for interest."

Wallace vs. McConnell, 13 *Peters*. 136.

In the case of Wallace vs. McConnell, *supra*, the Court says :

"When a note, or bill, is made payable at a bank, as is gen-"erally the case, it is well known that, according to the usual "course of business, the note or bill is lodged at the bank for "collection; and, if the maker, or acceptor, calls to take it up "when it falls due, it will be delivered to him, and the busi-"ness is closed. But, should he not find his note, or bill, at "the bank, he can deposit his money to meet the note when "presented; and, should he be afterwards prosecuted, he would "be exonerated from all costs and damages, upon proving such "tender and deposit. Or, should the note or bill be made "payable at some other place than a bank, and no deposit "could be made; or should he choose to retain his money in "his own possession, an offer to pay at the time and place, "would protect him against interest and costs, on bringing the "money into Court ; so that no practical inconvenience or

"hazard can result from the establishment of this rule to the 'maker or acceptor"

The bonds and coupons issued by the county to other railroad companies, were made payable at the American Exchange Bank, in New York, and the county always made arrangements to pay the interest at that place, when due, (rec. 94 and and 103) but as to these bonds and coupons, there is no pretense that she ever prepared, or offered to pay, any of them, except those due March 1st in the years 1859 and 1860.

We, therefore, say that as to the first and second reasons given by the Supreme Court of Illinois, they do not apply to this case.

The third reason, viz: That the common law does not allow interest, and that the Illinois Statute, relating to interest, does not include municipalities, we think wholly unsound—we regard it as immaterial, whether the Statute includes counties or not, because we insist that the county is liable to pay damage for failing to fulfill its promises, and these damages are at least the legal rate of interest in Illinois, if not the legal rate in the State of New York. It is not a matter of statutory right, but, says this Honorable Court, in the case of Curtis vs. Innerarity 6 *Howard, on page* 155.

"It is a dictate of natural justice, and the law of every civilized "country, that a man is bound in equity, not only to perform "his engagements, but also to repair all the damages that ac- "crue naturally from their breach. Hence, every nation, "whether governed by the civil or common law, has established "a certain common measure of reparation for the detention of "money not paid according to contract, which is usually cal- "culated at a certain and legal rate of interest."

"Every one who contracts to pay money on a certain day "knows, that, if he fails to fulfil his contract, he must pay the

"established rate of interest as damages for his non perfor-"mance. Hence it may correctly be said, that such is the im-"plied contract of the parties. See

2 Fonblangue, Eq. 423.

1 Domat, Book 3, tit. 5.

Says Parsons, in his work on contracts, 3 vol. p 102: "This 'interest is allowed on money withheld, if not on the ground "of some promise to pay it, express or implied, then as damages "for default, in retaining the money which belongs to another."

Sedgwick on Measure of Damages, Marginal Pages 247, 273, 378.

It is not a question of Statute, but, says Parsons on notes and bills, 2 vol. 292, "in this country principally, if not "altogether by usage and adjudication, indeed the rule may be "considered as entirely at an end in regard to notes and bills."

In Young vs Godbe 15 *Wallace*, on page 565, the court says:

"If a debt ought to be paid at a particular time, and is not, "owing to the default of the debtor, the creditor is entitled to "interest from that time by way of compensation for the delay "in payment. And if the account be stated, as the evidence "went to show was the case here, interest begins to run at "once."

"It is said there is no law in the Territory of Utah, prescrib-"ing a rate of interest in transactions like the one in contro-"versy in this suit, and that, therefore, no interest can be re-"covered. But this result does not follow. *If there is no "statute on the subject, interest will be allowed by way of dam-"ages for unreasonably withholding payment of an overdue "account.*"

And the Supreme Court of Illinois in Harper et. al. vs Ely et. al, 70 Ill. 581, held under the authority of Gilpeke vs

City of Dubuque, *supra*, Hallingsworth vs City of Detroit, *3 McLean 472*, and Dunlap vs Weseinan *2 Disney*, (*Ohio*,) *398*, that coupons in effect are promisory notes and that it knows of no reason why interest should not be computed upon them after they become due.

Why then is not a county liable for this damage? She is bound by an implied contract.

"The doctrine of *implied municipal* liability" says Mr. Chief Justice Field, in a case where the subject underwent very thorough examination, "applies to cases where money "or other property of a party is received under such circum- "stances that the general law, independent of express contract, "imposes the obligation upon the city to do justice with re- "spect to the same. If the city obtain money of another by "mistake, or without authority, of law, it is her duty to refund "it,— not from any contract entered into by her on the subject, "but from the general obligation to do justice, which binds "all persons, whether natural or artifical. If the city obtain "other property which does not belong to her, it is her duty "to restore it, or if used by her, to render an equivalent "to the true owner, from the like general obligation. The "law which always intends justice, implies a promise."

Dillon on Municipal Corporations, 1 ed. secs. 384, 750 and 751.

This honorable Court it seems to us, has fully settled the question that a municipal corporation on general principles, is liable for interest on coupons.

Aurora City vs West, supra.

Gilpeke vs. Dubuque, supra, and other authorities above referred to.

This question does not involve the construction of a Statute, because if the Statute of Illinois is not broad enough to em-

brace a county, it does not follow that the county is not liable, on general principles. And if there is any conflict between the State and the United States Courts, on this point, it is not one involving the construction of a Statute, but a conflict as to what the law is, viz: Do coupons, issued by a county, draw interest after maturity? As was said in the case of Township of Pine Grove vs Talcott, 19 *Wallace*, 677: "The "question before us belongs to the domain of General Juris- "prudence. In this class of cases, the Court is not bound by "the judgment of the Courts of the State where the cases arise. "It must hear and determine for itself. Here commercial se- "curities are involved. On such a question, the United States "Courts are not bound to follow the State Courts."

Township of Pine Grove vs. Talcott, supra.

Town of Venice vs. Murdock, 2 *Otto*, 494 and 501.

Oates vs. First National Bank of Montgomery, decided by this Court, October term, 1879. On general principles of commercial law, why should Morgan county insist that she should not pay interest on these coupons, and especially why should she so insist, after she has acted in such bad faith?

The bonds and coupons had been delivered, and undoubtedly would have been properly applied toward the construction of the road, or at least toward the payment of the company's debts, to the great benefit of the county, the company, and its creditors. But the county induces the bankers for the company not to let the company have them, promising the bankers that she would indemnify them against loss and damage.

Creditors of the company applied for them but could not obtain them. Garnishee proceedings were commenced against the bankers, and from that time to this, with a few short intervals, litigation has been going on about the bonds. The county not only precipitated this costly litigation by her

wrongful act, but after she had embarked, she is found making the secret and fraudulent arrangement with Vail and Ladd, and then further on we find her artfully conspiring with the Blair creditors to so cover up and conceal the bonds and coupons that Studwell, et. al., as trustees for these complainants, could not find them. Studwell et. al. commenced their suit, to reach the bonds under their judgment, the 22d of October, 1867, (rec. 257) and the county, by such conspiracy, caused the suit to be abandoned, and yet, after all these things, she thinks she ought not to pay interest or damage for so unlawfully detaining the money—in other words, she claims a profit for her wrongful acts. We might insist that the county is liable for this interest for the reasons that she was a trustee, and, as such trustee, has been guilty of fraud, in attempting to conceal and destroy the funds.

Ogden vs. Larrabee, 57 *Ill.*, 389.

We therefore say that the error is not sustained.

CROSS ERRORS.

First. The interest on matured coupons should have been calculated at seven per cent., by the special Master, instead of at six per centum.

As appears from the Master's report, the difference between the two rates amounts to $2,606.42, (rec. 89). These bonds and coupons were made payable in New York city, in pursuance of authority conferred by the legislature of Illinois upon the county, in amending the charter of the railroad company in 1859. The complainants, in their amendment to bill, claimed that the coupons, after maturity, drew the rate of interest that was allowed by the State of New York, viz: seven per centum. It is uniformly settled as a principal of general jurisprudence, that promissory notes, and bills of exchange, and other negotiable paper, after maturity, draw interest at the

rate allowed by the laws of the place of payment.

Parsons on Notes and Bills, 2 *vol.* 324.

Andrews vs. Pond, 13 *Peters*, 65.

Boyce vs. Edwards, 4 *Peters* 111.

And in the case of Gelpcke vs. City of Dubuque, 1 *Wallace*, 206, *supra*, this Court held that coupons issued by municipalities draw interest, after maturity, at the rate allowed by the law where they are made payable. We, therefore, think the Court erred in not allowing seven per centum.

Second. The amount of $4,700 *paid Morrison, and Morrison & Epler, for their attorneys fees, should not have been allowed as a credit.*

$1200 was paid to Morrison as his fee as solicitor for the county in the case of Blair et. al., vs. the county; Studwell, Hopkins and Cobb vs. the county; and Thomas vs. the county, (rec. 99)—$3,500 was paid to Morrison & Epler, as their fees as solicitors for the county, from the beginning of the Vail and Ladd matters down to the settlement with Vail and Ladd, (rec. 98).

Third. The amount of $2,102,66, *paid by Morgan County for attorneys fees and costs in the cases of Morgan County vs. Allen, et. al., and William Thomas vs the County, et. al. should not have been allowed as a credit.*

In the cases of William Thomas, vs. Morgan County, et. al. and Morgan county vs the Peoria, Pekin & Jacksonville Railroad Company et. al., the county paid out of this fund to her solicitors $1,798,00; Wm. Thomas' cost $120,14 and $134.52 for other costs.

Now in all these controversies wherein attorney's fees and costs were paid by the county, it has been shown that the county was attempting to destroy the trust fund; she was fighting for her own interest against the rights of those interested in

the trust fund; it was not for the preservation and proper appropriation of the fund she was seeking, but on the contrary to avoid the payment of her debts. Under such circumstances she cannot take a part of the trust fund to pay for litigation against the *cestui que trust*.

Perry on Trust is supported by numerous authorities, and we quote from sections 900 and 902. He says:

"If the misconduct or failure of the trustee to perform his "duty or his mere caprice or obstinacy renders a suit necessary "he must pay the costs. So if he refuses to account or wil- "fully misstates the accounts, or by any chicanery in his an- "swer keeps the *cestui que trust* from a correct knowledge of the "accounts, or if he has kept the accounts in a careless and con- "fused manner, the court will charge him with the costs. If "an executor denies that there are assets, contrary to the fact, "he will be charged with the costs. So if a trustee alleges in "his answer, that the *cestui que trust* is largely indebted to him "and after a long investigation it turns out that the trustee is "greatly in arrears, he will be decreed to pay costs. Or even "if the amount due the trustee is much less than he claimed, "he will be ordered to pay the costs."

"So, if a trustee sets up a claim of his own to the trust prop- "erty, and fails in his claim, he must pay all the costs. So, if "a trustee refuses the use of his name in the prosecution of a "suit for the interests of the trust estate, and the *cestui que* "*trust*, whereby the *cestui que trust* is obliged to institute the "suit in his own name, and join the trustee as a defendant, "the Court will order the trustee to pay the costs. So, if a "trustee has some private interest of his own, separate from, "and independent of, the trust, and he compels the *cestui que* "*trust* to come into a court of equity, merely for the purpose "of procuring a decision, at the expense of the estate, upon

"some point relating to his own private interest, the Court will "decree him to pay the whole costs. So, where trustees, in "their answer, pleaded ignorance of the trust but the Court "inferred, from the papers annexed to the answer, an intention "to defeat the ends of justice, costs were imposed upon the "trustees. Where a trustee is guilty of some misconduct which "does not amount to a wilful breach of the trust, or of some "omission of duty, which is of some inconvenience to the trust "he will not be allowed his costs. Thus, if he files an improper answer, he will not be allowed the costs of the answer."

Again, the same writer says :

"So, if a trustee makes a claim, in his account, which is "very much reduced by the Court, costs will not not be allowed him."

Again he says :

"Where trustees are decreed to pay the costs of a suit occasioned by their misconduct, or where they are refused their "costs for the same reason, they cannot charge the expenses of "the suit to the trust fund in their hands; as their misconduct "and breach of duty were personal, so the costs are personal, "and must be borne by them personally."

The county, by her wrongful action in procuring Elliott & Brown to withhold the bonds from the company—assuring them of indemnity—caused the first litigation, and which ended in the "Vail and Ladd" decree, rendered in conformity with the decision in the 39 *Ill. supra*. The county, by her wrongful act, made it necessary for William Thomas to institute the suit that was decided adversely to the county in the 59 *Ill. supra*, and afterwards in the 76 *Ill. supra*. By the county's wrongful act in attempting to donate $20,000, in the bonds, to the Peoria, Pekin & Jacksonville Railroad Company, and her attempt to recover back the same, also made necessary the de-

cision in the 76 *Ill. supra*. The county, in this suit, obtained a credit in the Court below of over ten thousand dollars, for these costs and attorneys fees. Had the county acted properly, none of these costs and attorneys fees would have been necessary. Having acted improperly, and for her own benefit, is she now entitled to her costs, so unlawfully incurred, out of the fund belonging to those against whom she was litigating? It most clearly appears to us she is not.

Under all the facts and circumstances in this case, we respectfully submit that, if the decree in this case is reversed, it should be reversed on the cross errors, with a direction to the Court below.

First, To allow interest on the coupons at the rate of seven per centum.

Second, To disallow the amounts paid by the county for attorneys fees and costs.

DEARBORN & CAMPBELL,
Attorneys for Appellees, John Allen, et. al.

IN THE

Supreme Court of the United States.

THE COUNTY OF MORGAN
vs.
JOHN ALLEN, ET. AL. } No. 78.

Additional Brief on the part of John Allen, et. al.

AS TO ESTOPPELS.

1. The bonds in question never have passed under the trust deed to Studwell, Hopkins & Cobb, as trustees.

See copy of trust deed, pp. 17, 18, record.

Morgan County, *et. al.*, vs. Thomas, *et. al.*, 76 Ills., 120.

2. Trustees' duty ended when the trust property was sold under the trust deed.

See copy of trust deed, pp. 17–24, record.

3. The judgment in favor of Studwell, Hopkins & Cobb, as trustees, in United States Circuit Court could confer no additional powers upon them. The judgment followed under the chancery practice in the State and Federal Courts in Illinois.

Therefore it must follow that the trustees could not create any estoppel as against the bondholders in reference to the bonds in question. The dismissal of the case of Studwell *et al.*, as trustees, vs. Morgan County, commenced in United States Circuit Court in Illinois—no estoppel.

The suit was not determined on its merits, but dismissed on complainant's motion.

Hughes vs. U. S., 4 Wall., 237.
Story Eq. Plead., sec. 793.
7 Johns, ch. 1.
Steere vs. Hoagland, 39 Ill., 266.

The bonds issued by the city of Jacksonville were not in lieu of the bonds in question. (See the only evidence in the record, dep. of Ralph Reynolds, pp. 130 and 131.)

The delivery of the bonds in question was unconditional. (See brief filed, bound in blue, pp. 34 to 48.) If it was, the condition could not affect our clients.

Thomas, et. al., vs. County of Morgan, 39 Ill., 498
Thomas, et. al., vs. County of Morgan, 59 Ill., 480.
Morgan County vs. Thomas, 76 Ill., 120.

The bonds are not void because of the irregularity in submitting the vote. (See brief filed, bound in blue, pp. 28 to 33.)

The county is only entitled to a credit in the "Vail and Ladd" and "Blair" cases for what she actually paid. (See brief filed, bound in blue, pp. 38 to 48.)

Scammon vs. Kimball, 92 U. S., 362.

We insist upon our cross-errors. (See brief filed, bound in blue, pp. 63 to 67.)

For a full statement of the facts in the case, with references to pages of the record in support of same, see brief filed, bound in blue.

H. S. GREENE,
W. H. CAMPBELL,
Attorneys for Allen, et. al.

SUPREME COURT
FILED
DEC 2 1880
JAMES H. McKENNEY, Clerk.

IN THE

Supreme Court of the United States.

October Term, A. D. 1880.

MORGAN COUNTY, Appellant,
vs.
JOHN ALLEN ET AL., Appellees. } No. 78.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF ILLINOIS.

Supplemental Brief of { WILLIAM BROWN,
WM. M. SPRINGR,
Of Counsel for Appellant.

State Journal Print.

IN THE

Supreme Court of the United States.

October Term, A. D. 1880.

MORGAN COUNTY, APPELLANT.

vs.

JOHN ALLEN, ET AL., APPELLEES.

Appeal from Circuit Court of the United States for the Southern District of Illinois.

May it please the Court:

As suggested in the argument, we beg leave to submit to the court the following authorities and suggestions in addition to those contained in the original brief.

I

The consideration upon which the bonds were issued and deposited with Elliott and Brown failed.

The Illinois River Railroad Company was incorporated in 1853. In 1856 Morgan County gave notice to the electors of that county to vote on the question whether they would subscribe $50,000 to each of three railroads. (Printed Transcript, 228.)

The county court made its order December 5, 1856, to subscribe $50,000 to the capital stock, *payable in bonds as required, i. e.*, upon calls. (Transcript, 230.)

At this time it was provided by statute in Illinois, (the act of 1849, sec. 4:) "No bonds shall be issued under the provisions of this act by any county or city, excepting for the amounts required to be paid at the time of subscription, and for the amounts of *and at the time when assessments upon all the stockholders of said company shall be regularly assessed and made payable.*"

The 4th section of the amendatory act of 1849, reads:

Sec. 4. "No subscription shall be made, or purchase, or bond issued by any county or city, under the provisions of this act, whereby any debt shall be created by said judges of the county court of any county, or by the common council of any city, to pay any such subscription, unless a majority of the qualified voters of such county or city (taking as a standard the number of votes thrown at the last general election previous to the vote had upon the question of subscription, under this act for county officers) shall vote the same; and the judges of the county court of any county, or the common council of any city, desiring to take stock as aforesaid, shall give at least thirty days' notice, in same manner as notices are given for the election of state or county officers, in said counties requiring said electors, of said counties or said cities, to vote upon the day named in such notices, at their usual place of voting, for or against the subscription for said capital stock, which they may propose to make, and said notices shall specify the company in which stock is proposed to be subscribed, the amount which it is proposed to take, and the time which the bonds proposed to be issued are to run, and the interest which said bonds are to bear; or, in case it is proposed to borrow money to pay such subscription, then the notices shall state the terms upon which said loan is to be effected; and the opinion of the electors shall be expressed upon their ballots 'for subscription' or 'against subscription,' and counted and returned by the judges and clerks of elections, as in other cases, and if a majority of the voters of said county or city, assuming the standard aforesaid, shall be in favor of the same, such authorized subscription or purchase, or any part thereof, shall then be made by said judges or common council. In case any election had under this act is held upon a day of general election, then the number of votes thrown at such general election for county officers shall be the standard of the number of qualified voters as afore-

said. *No bonds shall be issued under the provision of this act by any county or city, excepting for the amounts required to be paid at the time of subscription, and for the amounts of and at the time when assessments upon all the stockholders of said company shall be regularly assessed and made payable.*" (*Scates Comp. Stat.*, 950.)

There is no proof in the record that any calls were ever made.

To enable counties and cities to deliver bonds in payment of subscriptions at once, if deemed to their advantage so to do, the amendatory act of 1854 was passed. The title is "An act to facilitate the Construction of Railroads," approved March 1st, 1854. (See Transcript, 230–1.)

Considering these two acts together, and with the contract of the president of the railroad company that the bonds should be used in the construction of the road in Morgan County and not elsewhere, the County Court waived its rights under the act of 1849 to hold its bonds until regular calls and assessments had been made, and availed itself of an opportunity to contract that the bonds should be used, and paid out only for the construction of the road in Morgan County. (Transcript, 230–1.)

This, we contend, amounted to a contract as to the use of the bonds. They were executed and deposited with Elliott & Brown as an escrow, and have never gotten into the hands of the Illinois River Railroad Company, nor in the hands of innocent holders.

A discrimination should be made between the original subscription and the bonds. The original subscription might be reached, and was in fact exhausted, by the creditors of the railroad. It was an element entering into the consideration for the bonds, but was not accompanied by the circumstances and conditions upon which the bonds were issued. We do not contend, as charged by appellees in their brief, "that the fact of the insolvency of a railroad company should release the subscriber to its capital stock from liability on his subscription."

II.

The claims here set up are res judicata by the decree in the Vail & Ladd case.

This is a proceeding to reach the bonds, which are interest bearing, as distinguished from the capital stock subscription.

Appellees claim under a judgment rendered in favor of Studwell, Hopkins & Cobb, rendered June 24th, 1864, and are therefore at least privies to them.

Elliott and Brown being garnisheed by Vail and Ladd, judgment creditors of Illinois Railroad, and notified by the County of Morgan in 1859 not to pay out the bonds, and being drawn upon on account of the bonds by the railroad company, in the day of February, 1863, filed in the Morgan County Circuit Court their bill of interpleader, making the Illinois River Railroad Company, Studwell, Hopkins & Cobb, The County of Morgan, Vail & Ladd, Richard S. Thomas, William Thomas, parties; all of whom answered. An interlocutory order was made September 28th, 1863, requiring all these parties to interplead, and they did so, and Elliott and Brown were directed to deposit the bonds with M. P. Ayres & Co., to be held subject to the future order of the court. The case was then docketed in the names of the parties interpleading. (Transcript, 58-9.)

On the 13th of October, 1865, a final decree was entered dismissing the bills of Studwell, Hopkins & Cobb and others, and as to them the Supreme Court affirmed the decree of the court below. (Transcript, 60 and 62.)

At this time Studwell, Hopkins & Cobb had obtained their judgment in the United States Circuit Court, dated June 24th, 1864. (Transcript, p. 3 and 45.)

They had held this judgment for $1,061,000 for a year and four months prior to the final decree in the Vail and Ladd case, and should have filed their amendments or supplemental bill. They could have pleaded this fact.

Studwell, Hopkins & Cobb, judgment creditors, as they were, and not yet discharged from their trust, appealed to

the Supreme Court of Illinois; and that court, as to them, affirmed the judgment of the Morgan County Circuit Court.

All that might have been adjudicated is adjudicated.

Cromwell vs. County of Sac, 94 U. S., 351.

Kerrison vs. Stewart, 93 ib., 155.

This is so, although it was by a proceeding by cross bill or interpleader: all parties and privies are bound in such cases.

Prentice vs. Boynton, 3 B. Mnn., 636.

The appellees cannot attack this decree collaterally.

Kerreson vs. Stewart, 93 U. S., 155.

Owen vs. Golzin, 4 Dillon, 436.

We deny the jurisdiction of the United States Circuit Court to vacate the decree of a State court in such a case as that at bar. To set aside the decree of a court one must go to the particular jurisdiction. (Stevenson vs. Weber, 29 La. Ann., 105.)

Suppose, in the Vail & Ladd case, the court had decreed the bonds in question to be delivered to Studwell, Hopkins & Cobb, as prayed by them. The court might have so decreed; and in that event all these bonds would have passed out of the control of Morgan County under the decree, and would have gone into the pockets of complainants in this case, and would have been valid and subsisting obligations against the county, and the county would have been forever estopped from denying their validity. In that event could these complainants maintain the present action? Certainly not. And why not? Because the matter was *res judicata*. Then their rights to these bonds were adjudicated in that case, and against their right to them.

III:

The fact as to the conditional issue and delivery of the bonds in question was adjudicated in the Vail & Ladd case.

We invite the attention of the court to the decision of the Supreme Court of Illinois in the Vail & Ladd case, reported in 39th Ill. Reports, pages 498 to 504. The question as to the conditional or unconditional issue and delivery of these

bonds was a material one; a conditional delivery, for the purpose of being applied to work in Morgan County, was alleged on one side and denied on the other. The Illinois River Railroad Company, Studwell, Hopkins & Cobb, the trustees of complainants, Morgan County, and others were parties to the record. Independently of the question as to the rightful ownership of the bonds, this question of fact was adjudicated in that case. It was decided that the delivery was conditional. This decision is not reversed by the decision in 76th Illinois, page 141. The parties were different, and the fact had already been determined in 39th Illinois, *supra*. The question had already been set at rest by the prior adjudication.

Kelly et al. vs. Donlin et al., 70 Ill., 385–6.
Cromwell vs. County of Sac, 93 U. S. Rep., 352–5–9.
Aurora City vs. West, 7 Wallace, 102–3.

In the case of Cromwell vs. County of Sac this court held that the question of fact as to the fraudulent issue of the bonds in question in that case had been adjudicated in a former suit, and could not be opened in a subsequent litigation. So in this case, the conditional issue and delivery of the bonds was a fact adjudicated in the Vail and Ladd case, and all parties and privies to that case are forever estopped from asserting the fact to be otherwise than as there solemnly determined.

But complainants are estopped from denying the conditional issue and delivery of the bonds in question from the further fact that their trustees admitted and asserted the fact of conditional issue and delivery, and claimed title on that account, in their answer in the Vail and Ladd case. (See Record, pp. 64, 66, and 67.)

IV.

The decrees of the Circuit Court of Morgan County cannot be impeached collaterally.

This decree cannot be impeached collaterally for any facts, whether involving fraud, collusion, or not, or even per-

jury, which were necessarily before the court and passed upon. (The Acorn, 2 Abbott's U. S. Rep., 445.)

The judgment cannot be attacked collaterally. It must be in a direct proceeding for that purpose.

Smith vs. Smith, 22 Iowa, 516.
Mason vs. Messinger, 17 Iowa, 261.
Christmas vs. Russell, 5 Wallace, 305.

A judgment of a court of competent jurisdiction, having jurisdiction of the cause and parties, cannot be impeached collaterally for fraud.

Christmas vs. Russell, 5 Wallace, 305.
Mason vs. Messinger, 17 Iowa, 261.
Kelly vs. Mize. 3 Sneed, 60.

If on inspection of the record it appears that the court had jurisdiction of the subject-matter and parties, the judgment is conclusive. It cannot be impeached or called in question in a collateral way by parties or their privies, and is subject to correction only in an appellate court.

Van Doren vs. Horton, 1 Dutcher's Rep., N. J., 205.

It cannot be questioned, "*and is binding and conclusive upon all other courts of concurrent jurisdiction.*" (Bouvier Dic., tit. "Res Judicata.")

A decision makes white black, black white, the crooked straight, the straight crooked.

Whatever a court having jurisdiction of the *res* settles is binding on the world as to the thing. Having jurisdiction as to the *res* and *persmum* concludes the parties as to a trust fund. (Greenleaf, vol. 1, § 541–2.)

V.

Appellees are estopped by the decree in the case of Studwell, Hopkins & Cobb vs. Morgan County in the United State Circuit Court.

By oversight, perhaps, appellant did not plead as a bar to this proceeding below a decree of the Circuit Court of the

United States, rendered in a case wherein Studwell, Hopkins & Cobb, as judgment creditors of the Illinois River Railroad Company, instituted their suit to recover from Morgan County these bonds, or their equivalent, and which, upon the coming in of the answer of the county, was dismissed by the decree of that court.

If pleaded that decree would have been a bar to this action, and given in evidence, as it is, it operates to estop Studwell, Hopkins & Cobb and the appellees, who are their privies, from again litigating for these bonds.

The evidence of this decree is secondary, and if objected to would have necessitated the production of the Record, or a transcript of it. But unobjected to, it is in evidence, and operates to estop complainants from having their action against the county.

The evidence of this decree is found—

1. In the admission of appellees' brief. (Appellees' brief, page 41.)

2. Testimony of I. L. Morrison for appellees. (Printed transcript of Rec., 98.)

3. In testimony of H. G. Whitlock for appellees. (Printed Transcript, Rec., 102.)

4. Statements of Mr. Campbell, of counsel for appellee, in open court.

5. Testimony of H. E. Dummer; cross-examination by appellee. (Transcript, p. 126.)

Mr. Dummer was not then counsel for Morgan County, but was acting for the creditors of Illinois Railroad Company, who were complainants in the Blair case.

The dismissal of this case after answer barred complainants therein.

Borrowscale vs. Tuttle, 5 Allen, Mass., 377.

Coffman vs. Brown, 15 Miss., 125.

Sullivan vs. Bunster, 1 E. D. Smith, 681.
Wilcox vs. Bagler, 6 Ohio, 406.
2 Del. ch., 27.
Munson vs. Munson, 30 Conn., 582.
28 Conn., 532.

Though this decree was not pleaded, it being in evidence without objection to its competency or relevancy, it operated to estop complainants from the relief sought.

Bigelow on Estoppel, chap. 20, p. 518.

The fact that this record was in the court trying this case probably led to the waiver of objection to the competency or relevancy of the testimony.

VI.

It is inequitable to require Morgan County to pay this decree.

1. The complainants purchased bonds of the Illinois River Railroad Company to the amount of $1,020,000 for the sum of $200,000, about twenty cents on the dollar. The bonds bore ten per cent. interest or $100,000 a year; fifty per centum on the amount actually advanced. They were secured by a trust deed of extraordinary powers. Of course the object of so large an incumbrance was to absorb all the stock, property and franchises of the company, to defeat claims of other creditors, and to secure the road and all its effects for the sum advanced. There was default in the payment of the interest, which might have been expected, for the mortgage called for over $100,000 a year in interest from an enterprise in which the bondholders had invested but $200,000.

They took possession of the road, foreclosed their trust deed, obtained an order for the sale of the property, purchased it at the sale for $400,000, and took a judgment for balance due of $1,061,000. The road covered by the mortgage was forty miles long. They loaned $5,000 a mile on it, and bought it in for $10,000 a mile, and took a judgment for the balance due, equal to $25,500 a mile.

2. The complainants in this case never advanced a dollar on account of the subscription of Morgan County to the Illinois River Railroad Company. The bonds in question have never passed into the hands of innocent holders for value before or after maturity. They have never passed out of the hands of the custodians, where they were placed for a particular purpose, (to be paid out for work done in Morgan County,) and those appointed by the court, until, by order of the Circuit Court of Morgan County, they were ordered to be delivered to the county for cancellation. None of the principles, invoked for the relief of *bona fide* purchasers for value before maturity, apply to the bonds in question.

3. The bonds would never have been issued and placed in the hands of Elliott and Brown but for the agreement that they would be used to pay for work in Morgan County. (See answer of trustees, Record, pp. 64, 66, 67.) And but for the further fact that the president of the road filed a certificate with the county court to the effect that a contract had been made with Allen and McGrady to build the road to Jacksonville, the county seat of Morgan County, and that in that contract it was stipulated that the contractors were to be paid the Morgan County bonds for work done in that county. Yet the railroad company, after they had procured the issue of the bonds, used an order for $4,000 of the bonds to buy off the contractors, who were to build the road in the county. (See answer of trustees, p. 67.)

4. After the Illinois River Railroad Company had failed to build the road in Morgan County the trustees, Studwell, Hopkins, and Cobb, procured a charter from the Legislature, organizing the Peoria, Pekin, and Jacksonville Railroad Company. To this new company the purchasers of the railroad, Allen, Arnold, and Trowbridge, the complainants in this case, conveyed the Illinois River Road and all its property, franchises, &c. The new company did not secure any additional franchises from the Legislature which the old company did not have. The object in procuring the new char-

ter was evidently to create a purchaser for the old company's road, which could take all its property and assets, without incurring any of the liabilities of the old company. The complainants as purchasers of the old road took all its real and personal property, and as judgment creditors they now claim all the assets of the old company. By this legislative proceeding they destroyed all the rights of the stockholders who had furnished most of the money to build the road, and by their subsequent conduct they sought to defeat the claims of laborers, contractors, and material men who had aided in building the road, and whose claims Studwell had contracted that the Illinois Railroad Company should pay in full out of the assets of the company. (See his contract, Record, p. 222.) Mr. Greene, of counsel for complainants, asserted in argument that most of the claims of creditors allowed in the Blair case were fraudulent. There is no evidence in the record to sustain this charge, nor to negative the authority of Mr. B. S. Prettyman, the vice-president and attorney of the Illinois River Railroad, to enter the appearance of the old company, and appear as its counsel. Mr. Prettyman is a prominent lawyer in Illinois, well known to all the courts. His authority must be presumed until the contrary is proven.

5. Before proceeding to build the road under the new charter in Morgan County, John Allen, the president of the new company and one of complainants, threatened to divert the road from Jacksonville unless that city would pay $50,000. A citizens' meeting was called. Mr. Morrison, one of Mr. Allen's attorneys in this case, was consulted as to whether Morgan County would have to pay the $50,000 subscribed to the old company. He said "no." And thereupon, in order to secure the building of the road in Morgan County to Jacksonville, $50,000 were subscribed by that city and paid. This secured the building of the road to that city.

6. While the new charter was pending in the legislature, Messrs. Studwell & Hopkins, two of the trustees, stipulated

that the new charter should in no way affect the rights of trustees or bondholders or creditors of the old company to the Morgan County bonds, "now [then] in litigation in the Circuit Court of Morgan County, but the right and title to said bonds shall be left to be decided in the suit now [then] pending in the said suit in the Morgan County Circuit Court." (See Record, p. 217.) The suit referred to was that known as the Vail & Ladd case, in argument, in which Messrs. Studwell, Hopkins & Cobb were impleaded, answered, and appealed to the Supreme Court of Illinois, where the judgment dismissing their bill of interpleader, and denying their right to the bonds, was affirmed. They not only had their day in court, but they agreed beforehand to abide by the judgment.

7. If complainants, as judgment creditors, were entitled to the bonds in question, they should have brought forward this ground for recovery in the Vail & Ladd case, through their trustees, who were parties to that suit. They should have litigated all their rights in that case. The rule in chancery is that parties must set up all of the rights which they have in and to the subject-matter in controversy. If, pending the action, and before final decree, they acquire a new right to the subject-matter, they must assert it by appropriate pleadings, either by amendment to their answer, if defendants, or by a supplemental bill, if complainants. Complainants cannot litigate their rights by piecemeal and legal experiments. This doctrine is too well understood to require citation of authority.

8. We invite the attention of the court to the consequences of this decree which will illustrate the hardship which would ensue if this decree is permitted to stand.

It must be borne in mind that Morgan County has never sought litigation, but has always defended.

The county was subrogated to the rights of the parties, whose demands against the Illinois River Railroad she paid by the force of the decrees against her, and the only assertion of

fraud comes from Mr. Morrison, who was her counsel in the proceeding assailed, and from Mr. Whitlock, who was also her counsel. (Transcript of Record, 257.)

Each of these gentlemen sign the answer of Morgan County in the Blair case. (Record, 257.)

If required to pay this decree the people of Morgan County will have paid to get this road as follows:

Amount of Vail & Ladd decree	$7,008.10
" Blair "	41,145.24
" Schooley & West decree	1,176.48
" Wm. Thomas decree	6,160.00
Outstanding bonds, (put out by Mr. Morrison)	1,580.80
Costs and legal expenses	2,102.66
Attorney's fee found by U. S. court to Morrison & Epler	4,700.00
Subscription of City of Jacksonville	50,000.00
Amount of present decree	72,539.56
Total	$186,726.84

Morgan County contracted to give her $50,000 of bonds to get this road built to Jacksonville, and through threats of diversion of the road, (see testimony of Reynolds, transcript, p. 130,) the new railroad company, through Mr. Allen, one of the complainants herein, obtained $50,000 from the City of Jacksonville, in Morgan County, which, with the other sums paid and the decree in this case, make an aggregate of $186,726.84. If such are the workings of equity we are unable to see what would be inequitable.

VII.

Messrs. Studwell, Hopkins & Cobb continued to hold and exercise the office of trustees until discharged by order of the United States Circuit Court, July 6, 1869.

The question was raised in argument as to the time when Studwell, Hopkins & Cobb ceased to be trustees. The learned counsel for complainants held that the trust was terminated when the sale was made October 1st, 1863. We contended

in argument that the trust was not terminated until the trustees were discharged by order of the court in July, 1869. The record relieves the question of all doubt.

The Illinois River Railroad Company, by deed executed November 1, 1858, (Rec., p. 16,) conveyed to said trustees the railroad, then constructed or thereafter to be constructed, together with all its lands, depots, shops, &c., and all its franchises, locomotives, cars, tools, all goods and chattels, together with rents, issues, income, profits, moneys, rights, benefits and advantages, then held or thereafter to be acquired, (Rec., p. 18,) in trust for those who may be the owners of said $1,620,000 of its bonds, which bonds were payable in twenty years. The trust deed further provided that upon the payment "*in full*" of said bonds and the interest due thereon, then "these presents (the trust deed) and the estate granted should cease and be void." (Rec., p. 23.) The deed also provided that in case of default in any of the payments of interest the whole debt should become due, and the trustees were authorized to take possession of the entire property, collect receipts, and sell the road without foreclosure in court. (Rec., p. 22.) The railroad company failed to pay the interest, and on July 12th, 1862, the trustees took possession of the road and all its property, and proceeded to operate it as trustees. On December 17th, 1862, they filed a bill in the United States Circuit Court for the Southern District of Illinois to foreclose the trust deed.

June 16, 1863, they obtained a decree for the amount due, about $1,400,000, and an order for the sale of the property. The sale was made October 1, 1863, for $400,000, the purchasers being Allen, Arnold and Trowbridge, the complainants in the case at bar. They were also the bondholders.

The master's report was approved June 24, 1864, and a judgment rendered in the names of the trustees for the balance, $1,061,292.56. The decree for the sale of the property having directed the trustees, after receiving the proceeds of the sale, to cause a notice to be published in Springfield, Illinois, and in New York, requiring the bondholders to pre-

sent their bonds for payment *pro rata* as provided, and the trustees not having been discharged, the cause was continued for further report.

On the 6th day of July, 1869, affidavits having been filed, showing that the trustees had fully discharged all their duties as trustees under the mortgage or deed of trust, and that they had fully accounted for all moneys received by them as such trustees, it was ordered, adjudged and decreed that Studwell, Hopkins and Cobb be forever discharged as trustees under the mortgage, and the said trust was declared finally settled, adjusted, and closed. (Record, pp. 45–6.)

On the 13th of October, 1865, one year and four months after the sale of the property, under the trust deed, their bill of interpleader having, on that day, been dismissed in the Vail and Ladd case in the Morgan County Circuit Court, the trustees appeared in that court and prayed an appeal to the Supreme Court of Illinois. (Record, p. 61.) At the January term, 1868, of the Circuit Court of the United States at Springfield, Studwell, Hopkins and Cobb filed a bill in chancery as trustees, to reach the bonds in question, on the ground that they were judgment creditors of the Illinois River Railroad Company. (Dep. of Morrison, Record, p. 98.) They dismissed their bill in that court, on the coming in of the answer of Morgan County, the respondent in that case. (Record, p. 98.)

We thus find from the record that Studwell, Hopkins and Cobb continued to act as trustees for the bondholders, under the deed of trust, until they were finally discharged by the United States court in 1869. Their trust having been created to continue until all the bonds were paid *in full*, they could not be discharged from their trust until that time, unless by consent of all the parties interested, or by a discharge by the authority of the court where the suit for foreclosure was pending.

The trustees having continued to act as such until discharged by order of court, are estopped from claiming release from the trust prior to that time. The *cestui que*

trusts having made no objection in the court to the discharge of the trustees, we have a right to presume that all their acts as such trustees were approved by them. The *cestui que trusts* are also estopped from disavowing the acts of the trustees in their behalf, prior to their discharge by the court, since they were discharged without objection. If the court had not discharged the trustees, there might have been some doubt as to the exact time when they were discharged by a full performance of all the trusts. But the judgment of the court that they were discharged from and after a particular date, negatives the idea of a discharge by full performance of the trusts prior thereto. Studwell, Hopkins & Cobb were therefore trustees under the trust-deed until July, 1869, nearly four years after they prayed an appeal in the Vail & Ladd case, upon the dismissal of their bill of interpleader, and eight months after they dismissed their bill in chancery, in the United States Court at Springfield, to reach the bonds in question as judgment creditors of the Illinois River Railroad Company.

VIII.

Counsel for Morgan County in this case concede to its fullest extent the doctrine announced by this court in the case of Sawyer vs. Hoag, 17 Wallace, 620, and re-affirmed in Scammon vs. Kimball, 2 Otto, 362, to the effect that subscriptions to the capital stock of corporations are trust-funds devoted to the payment of all the creditors of the company. In three cases, which went to the Supreme Court of Illinois, reported in 39th, 59th and 76th Ill. Reports, and in the Blair case, which was not appealed, the subscription of Morgan County has been applied by proper adjudication to the payment of such creditors, and all these adjudications have either directly denied the right of complainants, or their privies, to any part of these bonds, or have assumed that no such right existed.

WILLIAM BROWN,
WM. M. SPRINGER,
Of Counsel for Morgan County.

SUPREME COURT, U.S.
FILED
DEC 10 1880

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1880.

THE COUNTY OF MORGAN COUNTY, Appellant,
vs.
JOHN ALLEN, ET. AL., Appellees. } No. 78.

Reply of Attorneys for John Allen, Et. At., to the "Supplemental Brief" of William Brown & Wm. M. Springer.

IN THE

SUPREME COURT OF THE U. S.,

OCTOBER TERM, A. D. 1880.

THE COUNTY OF MORGAN, Appellant,

vs.

JOHN ALLEN, Et Al., Appellees.

May it please the Court: Representing the appellants in the cross appeal in this case, we filed our argument—(the one bound in blue)—before seeing the one on the part of Morgan County, and based the same upon the errors assigned by the county. Mr. Morrison also prepared an argument, and sent it to the clerk, but as he has not been admitted to practice in this Court, the same was not filed. In order to have it filed, at the suggestion of the clerk we signed the same. After seeing the argument filed in behalf of Morgan County, we found she had not insisted upon some of the errors we touched upon, and which she had assigned—among

which was the question of interest on coupons. On the oral argument, the county relied chiefly on the question of estoppel. The counsel for Morgan County stated that they would file an additional brief, and supposing it would be based upon the question of estoppel, we prepared and filed points on that question. We have just received a copy of a "supplemental brief" in behalf of the county, and in reply to same. We ask to submit the following in addition to what we have heretofore said:

I.

In response to the assertion that the consideration upon which the bonds were issued has failed, we say:

1st—The vote was unconditional—(Transcript, 215).

2d—The subscription was unconditional—(Transcript, 230-232).

3d—The bonds were delivered under the act entitled "An Act to facilitate the construction of railroads"—approved March 1st, 1854.(—Transcript, 230, 231).

4th—The bonds were unconditionally delivered.—(Transcript, 230-231; Morgan County et al, vs Thomas et al, 76 Ill., 121; also see brief filed, bound in blue, p. 34 38, where the facts are clearly stated).

5th—The bonds were not delivered "as an escrow."—(Transcript, 230-232); Morgan County, et al, vs Thomas et al, 76 Ill.; 121; also see full statement of the facts in brief, bound in blue, pp. 34-38).

6th—If the bonds had been delivered conditionally, the conditions could not affect our clients.

Thomas et al, vs the County of Morgan, 39 Ill., 498.
Thomas et al, v the County of Morgan, 59 Ill., 480.
Morgan County vs Thomas, 76 Ill., 120.

The counsel for the county contend that "the fact of the conditional issue and delivery" was adjudicated in the "Vail & Ladd" case, in 39 Ill., 480.

In reply we say: 1st—Our clients were not parties to that suit. 2d—Afterwards the Supreme Court, in Morgan County vs Thomas 76 Ill., 120, carefully examined the facts, and found there was no such condition. 3d—This case is to be determined from the facts in the record, and the record shows there was no such condition. (See review of evidence with references—brief bound in blue, pp. 34-38).

7th—In any event, the fact that the old Illinois River Railroad Company did not complete the road to Jacksonville does not render the defense of failure of consideration available, for the reason that the subscription to the capital stock of a railroad corporation must be paid, and "this, too, although the company, subsequently to the making of the subscription, may have abandoned all proceedings under its charter, on account of its insolvency."

Morgan County vs Thomas, 76 Ill., 120.
Henry vs the Vermillion & Ashland Railway Company, 17 Ohio, 187.
Meirs vs Z. & M. T. Company, 11 Ohio, 273.
1 Redfield on Railways, 3d ed., 170.

On this point, it is wholly immaterial whether the suit to

enforce the payment of such subscription is brought on the subscription itself, or upon a note or bond given for the same.

Scamman & Kimball, assignees, 92 U. S. 362.

II.

The claims of our clients are not "*res judicata*" by the decree in the "Vail & Ladd" case.

1st—Our clients were not parties to the suit.

2d—The trustees, Studwell, Hopkins and Cobb could not create an estoppel so as to affect our clients, for the following reasons:

1st—Because the bonds never passed under the trust deed. —Answer of Morgan County, Transcript 56; Trust Deed, Transcript, pp. 17, 18; Morgan County vs Thomas 76 Ill., 120).

2d—Because the duties of the trustees ended when they sold the trust property. (Copy trust deed, pp. 17-24).

3d—Because they could not acquire any additional right on account of the judgment rendered in their names as trustees. The judgment was entered up in accordance with the Chancery practice in both the State and Federal Courts of Illinois.

Again: The facts relating to the "Vail and Ladd" case show clearly that the decree, as entered, was procured by Morgan County to promote her own interest. (See statement of the facts, with references, in brief bound in blue, 8–10.)

But it is said we cannot impeach the decree of a State Court or attack a decree collaterally. If such were the law,

we are not driven to impeach or attack the decree, because the county, in any phase of the question, is only entitled to a credit for what she actually paid. (See authorities cited in brief bound in blue, pp. 38-48; Scammon vs. Kimball, 92 U. S. 362.)

III.

Our clients are not estopped by the dismissal of the case of the trustees against Morgan County in the United States Circuit Court, for the following reasons:

1st. No part of the record in that case was introduced in evidence.

2nd. The trustees had no right to commence the suit, as we have seen, because the trust deed did not authorize it, and therefore could not bind our clients.

3rd. The suit was not determined on its merits, but dismissed on complainants' motion, and therefore no estoppel was created.

Hughs vs. U. S., 4 Wall 237; Story Eq. Plead sec. 793; 7 Johns, c. 1.

IV.

In answer to the charge, "It is inequitable to require Morgan County to pay this decree," we say:

1st. That it is not true that the complainants "never advanced a dollar on account of the subscription." On the contrary, it is to be presumed that they relied in part upon the subscription, when they purchased the bonds issued by the railroad company, for the bonds in question had been delivered to the railroad company and were in the custody of the bank-

ers, for and as for the railroad company, and no question had been raised as to their validity, or that they should not be paid out upon the order of the railroad company, at the time the complainants purchased about $900,000 of the bonds of the company. Their purchase was in April or May, 1862. (Transcript 111.) The bonds had remained in the custody of the bankers, for the railroad company, from 1857 to February 28th, 1863, before the title to them was questioned. (Answer Morgan Co., bottom of page, 53 Transcript.)

2nd. The bonds issued by the City of Jacksonville, were not in lieu of the bonds in question. (See the only evidence in the record dep. of Ralph Reynolds, pp. 130 and 131.) The statements of counsel that Mr. Allen threatened to divert the road from Jacksonville, and as to the part Mr. Morrison took in the matter, is wholly unfounded—however immaterial their acts in this matter may be—the only evidence on these points being the deposition of Ralph Reynolds, pp. 130 and 131. These complainants were not the only owners of the P., P. & J R. R. Co. (Transcript 115.)

3rd. As to the "consequences of this decree:" The county has received credit for everything she has paid, whether in bonds or money; also for $4,700 attorneys' fees, and $2,102.66 costs of court; which two items, with the interest allowed on same, amount to about $10,000. (Transcript 86-89.)

At the time the county settled the "Vail and Ladd" and "Blair" cases, and made other expenditures, the matured coupons—which were at par at all times—far exceeded in amount, the sums the county paid. (Transcript 93, 94, 100,

106, 117, 118 and 119.) The county has received all she expected, *viz:* The construction of the line of railroad. The line was completed from Virginia to the terminus in Morgan County, several years before the commencement of this suit. (Transcript 114.)

We think if the decree is reversed, it should be reversed on the cross-errors, with directions to the court below to disallow the items of $4,700 attorneys' fees and $2,100 costs, and to charge the county with seven per cent. interest on matured coupons, instead of six per cent.

DEARBORN & CAMPBELL

Sols. for John Allen, Et. Al.

IN THE

SUPREME COURT OF THE UNITED STATES.

OF THE OCTOBER TERM, A. D 1880.

THE COUNTY OF MORGAN,
Appellant,

vs.

JOHN ALLEN ET. AL,
Appellees.

Petition for Re-hearing.

WM. M. SPRINGER,
J. T. SPRINGER,
E. P. KIRBY,
WM. BROWN.
Attorneys for Petitioner.

CHICAGO:
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1881.

IN THE

Supreme Court of the United States,

OCTOBER TERM A. D. 1880.

THE COUNTY OF MORGAN,
Appellant,

vs.

JOHN ALLEN AND EDWIN S. TROWBRIDGE, SURVIVORS, &C.,
Appellees.

Appeal from U. S. Circuit Court for Southern District of Illinois

PETITION FOR RE-HEARING.

TO THE HONORABLE THE JUDGES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner, the county of Morgan, appellant in the above entitled case, respectfully pray your Honors to reconsider the opinion filed in the above entitled cause, and the order made therein affirming the decree of the Circuit Court of the United States for the Southern District of Illinois, and to grant to the said county of Morgan a re-hearing. And appellant would state the following grounds upon which they rely for asking a re-hearing:

I.

For the purpose of suggesting a diminution of the record, and asking for a rule on the Circuit clerk of the

Southern District of Illinois to certify to this Court a perfect record of the proceedings below, and thereby the proceedings in case of Studwell, Hopkins & Cobb, for the benefit of the creditors of *Illinois River R. R. Co.* v. *Morgan County*, will be properly before this Court.

II.

The opinion of the Court proceeds upon the mistaken theory that Morgan county was acting in bad faith in the endeavor to avoid an equitable demand against her, and that she was a trustee, improperly using and appropriating a trust fund.

III.

The opinion of the Court assumes that Morgan county obtained the trust fund for an inadequate consideration, when in truth the record shows that she was in good faith, and, under the decrees of the Courts of Illinois, actually paid out more money than the bonds called for, and retired and discharged more of the indebtedness of the Ill. R. R. R. than her bonds amounted to.

IV.

It is assumed by the statement of facts made by the Court, that Morgan county has only made a payment on these bonds of a little over $19,000 to certain creditors of the Illinois River R. R. Co., and has attempted, to the prejudice of other creditors, to discharge its indebtedness to that insolvent corporation to a much greater sum thereby, when it is shown by the transcript that Morgan county has acted in good faith and paid out a much larger sum under the adjudication of the courts of Illinois.

V.

It is further assumed that Morgan county got the benefit of the construction of the railroad as contracted for, and that she should not complain of having to pay the bonds. It is overlooked that the city of Jacksonville, a city of that county, paid to a part of the appellees here $50,000.00 as a bonus for that compliance with the contract, under the threat that they would divert the road from Jacksonville and Morgan county.

VI.

It is also respectfully suggested that a re-hearing of this case can work no injury, as, if the decree be finally affirmed by a full court, the interest to be paid will fully compensate appellees for the delay of payment.

VII.

The ends of justice seem to require that a re-hearing be granted, since there has been so great a division of opinion among the learned judges of this Court, and since at least a part of the Court as now constituted have from necessity been precluded from taking part in the decision of the case.

VIII.

Because, by affirming the decree of the Court below, a practical injustice is done Morgan county in depriving her of the benefit of the decrees of courts of competent jurisdiction, and she is also deprived of the benefit of being subrogated to the rights of diligent creditors of the

Illinois River R. R., who were in equity entitled to a priority over those who neglected to assert their rights.

MAY IT PLEASE THE COURT:

We would respectfully call the attention of the Court to the following points:

1.

It is desired to suggest a diminution of the record to meet the suggestions in the opinion of the Court. Upon the hearing of this case it was earnestly urged that the claim of appellees against the county of Morgan was barred by the adjudication of the Circuit Court of the United States for the Southern District of Illinois.

We now observe in the opinion of the Court, just handed to us, that this point was not seriously regarded, because there was nothing of the sort to be found in the transcript of the record. It is true, that the proceedings of the United States Court in the case of Studwell, Hopkins & Cobb, were not copied into the transcript of the record, but it is equally true that it should have been. But finding, as counsel did, that the existence of such proceedings was admitted in argument, and recited time over and again in the evidence and briefs of counsel on the other side, Morgan County rested in the belief that the principle, that when in evidence it would be as efficacious as an estoppel as it would be as a bar when pleaded, did not seek to delay the case by a suggestion of a dimunition of the record.

We now respectfully ask of the Court a re-hearing of this case, so that we may obviate the objection that the record of this proceeding is not to be found in the transcript.

Your Honors say you "are not advised in any proper form of the nature and object of that suit, nor who were the parties to it." It would afford counsel for Morgan

County pleasure to be able to send with this hastily and imperfectly prepared paper a certified copy of the proceedings in that case, but it cannot now be had in time, but we trust it will be laid before the Court by the time this petition is passed upon.

We fully recognize the tax which we are placing on your Honors by this petition, and regret it. If the Court may consider the suggestions herein worthy of consideration, it necessarily involves much labor. Yet, in the consciousness that our client is suffering an injustice which a better record and more thorough presentation of the disputed points may obviate, we are constrained to ask this re-hearing, and trust that more argument may produce more light, and that a tardy justice may yet come to the injured people of the petitioner.

II.

The consideration upon which the bonds were issued and deposited with Elliott and Brown failed.

The Illinois River Railroad Company was incorporated in 1853. In 1856 Morgan county gave notice to the electors of that county to vote on the question whether they would subscribe $50,000 to each of three railroads. (Printed Transcript, 228.)

The county court made its order December 5, 1856, to subscribe $50,000 to the capital stock, *payable in bonds as required, i. e.*, upon calls. (Transcript, 230.)

At this time it was provided by statute in Illinois (the act of 1849, Sec. 4:) "No bonds shall be issued under the provisions of this act by any county or city, excepting for the amounts required to be paid at the time of subscription, and for the amounts of *and at the time when assessments upon all the stockholders of said company shall be regularly assessed and made payable.*"

The 4th section of the amendatory act of 1849, reads:

Sec. 4. "No subscription shall be made, or purchase, or bond issued by any county or city, under the provisions of this act, whereby any debt shall be created by said judges of the county court of any county, or by the common council of any city, to pay any such subscription, unless a majority of the qualified voters of such county or city (taking as a standard the number of votes thrown at the last general election previous to the vote had upon the question of subscription, under this act for county officers) shall vote the same; and the judges of the county court of any county, or the common council of any city, desiring to take stock as aforesaid, shall give at least thirty days' notice, in same manner as notices are given for the election of state or county officers, in said counties requiring said electors, of said counties or said cities, to vote upon the day named in such notices, at their usual place of voting, for or against the subscription for said capital stock, which they may propose to make, and said notices shall specify the company in which stock is proposed to be subscribed, the amount which it is proposed to take, and the time which the bonds proposed to be issued are to run, and the interest which said bonds are to bear; or, in case it is proposed to borrow money to pay such subscription, then the notices shall state the terms upon which said loan is to be effected; and the opinion of the electors shall be expressed upon their ballots 'for subscription' or 'against subscription,' and counted and returned by the judges and clerks of elections, as in other cases, and if a majority of the voters of said county or city, assuming the standard aforesaid, shall be in favor of the same, such authorized subscription or purchase, or any part thereof, shall then be made by said judges or common council. In case any election had under this act is held upon a day of general election, then the number of votes thrown at such general election for county officers shall be

the standard of the number of qualified voters as aforesaid. *No bonds shall be issued under the provision of this act by any county or city, excepting for the amounts required to be paid at the time of subscription, and for the amounts of and at the time when assessments upon all the stockholders of said company shall be regularly assessed and made payable.*" (*Scates Comp. Stat.*, 950.)

There is no proof in the record that any calls were ever made.

To enable counties and cities to deliver bonds in payment of subscriptions at once, if deemed to their advantage so to do, the amendatory act of 1854 was passed. The title is "An act to facilitate the Construction of Railroads," approved March 1st, 1854. (See Transcript, 230–1).

Considering these two acts together, and with the contract of the president of the railroad company that the bonds should be used in the construction of the road in Morgan county and not elsewhere, the County Court waived its rights under the act of 1849 to hold its bonds until regular calls and assessments had been made, and availed itself of an opportunity to contract that the bonds should be used, and paid out only for the construction of the road in Morgan county (Transcript, 230–1).

This, we contend, amounted to a contract as to the use of the bonds. They were executed and deposited with Elliott and Brown as an escrow, and have never gotten into the hands of the Illinois River Railroad Company, nor in the hands of innocent holders.

A discrimination should be made between the original subscription and the bonds. The original subscription might be reached, and was in fact exhausted, by the creditors of the railroad. It was an element entering into the consideration for the bonds, but was not accompanied by the circumstances and conditions upon which the bonds

were issued. We do not contend, as charged by appellees in their brief, "that the fact of the insolvency of a railroad company should release the subscriber to its capital stock from liability on his subscription."

III.

The claims here set up are res judicata by the decree in the Vail & Ladd case.

This is a proceeding to reach the bonds, which are interest bearing, as distinguished from the capital stock subscription.

Appellees claim under a judgment rendered in favor of Studwell, Hopkins & Cobb, rendered June 24th, 1864, and are therefore at least privies to them.

Elliott and Brown being garnisheed by Vail and Ladd, judgment creditors of Illinois Railroad, and notified by the county of Morgan in 1859 not to pay out the bonds, and being drawn upon on account of the bonds by the railroad company, in the day of February, 1863, filed in the Morgan County Circuit Court their bill of interpleader, making the Illinois River Railroad Company, Studwell, Hopkins & Cobb, The County of Morgan, Vail & Ladd, Richard S. Thomas, William Thomas, parties; all of whom answered. An interlocutory order was made September 28th, 1863, requiring all these parties to interplead, and they did so, and Elliott and Brown were directed to deposit the bonds with M. P. Ayres & Co., to be held subject to the future order of the Court. The case was then docketed in the names of the parties interpleading (Transcript, 58–9).

On the 13th of October, 1865, a final decree was entered dismissing the bills of Studwell, Hopkins & Cobb and others, and as to them the Supreme Court affirmed the decree of the Court below (Transcript, 60 and 62).

At this time Studwell, Hopkins & Cobb had obtained their judgment in the United States Circuit Court, dated June 24th, 1864 (Transcript, pp. 3 and 45).

They had held this judgment for $1,061,000 for a year and four months prior to the final decree in the Vail and Ladd case, and should have filed their amendments or supplemental bill. They could have pleaded this fact.

Studwell, Hopkins & Cobb, judgment creditors as they were, and not yet discharged from their trust, appealed to the Supreme Court of Illinois; and that court, as to them, affirmed the judgment of the Morgan County Circuit Court.

All that might have been adjudicated is adjudicated.

Cromwell v. *County of Sac*, 94 U. S. 351.
Kerrison v. *Stewart*, 93 ib. 155.

This is so, although it was by a proceeding by cross-bill or interpleader; all parties and privies are bound in such cases.

Prentice v. *Boynton*, 3 B. Mnn. 636.

The appellees cannot attack this decree collaterally.

Kerreson v. *Stewart*, 93 U. S. 155.
Owen v. *Golzin*, 4 Dillon, 436.

We deny the jurisdiction of the United States Circuit Court to vacate the decree of a State court in such a case as that at bar. To set aside the decree of a court one must go to the particular jurisdiction. *Stevenson* v. *Weber*, 29 La. Ann. 105.

Suppose, in the Vail & Ladd case, the court had decreed the bonds in question to be delivered to Studwell, Hopkins and Cobb, as prayed by them. The court might have so decreed; and in that event all these bonds would have passed out of the control of Morgan County under the decree, and would have gone into the pockets of complainants in this case, and would have been valid and subsisting obligations against the county, and the county would

have been forever estopped from denying their validity. In that event, could these complainants maintain the present action? Certainly not. And why not? Because the matter was *res judicata*. Then their rights to these bonds were adjudicated in that case, and against their right to them.

IV.

The fact as to the conditional issue and delivery of the bonds in question was adjucated in the Vail and Ladd case.

We invite the attention of the Court to the decision of the Supreme Court of Ill. in the Vail and Ladd case, reported in 39th Ill. Rep. pp. 498 to 504. The question as to conditional or unconditional issue and delivery of these bonds was a material one; a conditional delivery, for the purpose of being applied to work in Morgan County, was alleged on one side and denied on the other. The The Illinois River Railroad Company, Studwel, Hopkins, & Cobb, the trustees of complainants, Morgan County, and others were parties to the record. Independently of the question as to the rightful ownership of the bonds, this question of fact was adjucated in that case. It was decided that the delivery was conditional. This decision is not reversed by the decision in 76th Illinois, page 141. The parties were different, and the fact had already been determined in 39th Illinois, *supra*. The question had already been set at rest by the prior adjudication.

Kelly et al. v. *Donlin et al.* 70 Ill. 385–6.
Cromwell v. *County of Sac*, 93 U. S. Rep. 352–5–9.
Aurora City v. *West*, 7 Wallace, 102–3.

In the case of *Cromwell* v. *County of Sac*, this court held that the question of fact as to the fraudulent issue of the bonds in question in that case had been adjudicated in a former suit, and could not be opened in a subsequent liti-

gation. So in this case, the conditional issue and delivery of the bonds was a fact adjudicated in the Vail and Ladd case, and all parties and privies to that case are forev e estopped from asserting the fact to be otherwise than as there solemnly determined.

But complainants are estopped from denying the conditional issue and delivery of the bonds in question from the further fact that their trustees admitted and asserted the fact of conditional issue and delivery, and claimed title on that account, in their answer in the Vail and Ladd case. (See Record, pp. 64, 66, and 67.)

V.

The decrees of the Circuit Court of Morgan County cannot be impeached collaterally.

This decree cannot be impeached collaterally for any facts, whether involving fraud, collusion, or not, or even perjury, which were necessarily before the Court and passed upon. (The Acorn, 2 Abbott's U. S, Rep. 445.)

The judgmnt cannot be attacked collaterally. It must be in a direct proceeding for that purpose.

Smith v. *Smith*, 22 Iowa, 516.
Mason v. *Messinger*, 17 Iowa, 261.
Christmas v. *Russell*, 5 Wallace, 305.
Hernandez v. *Drake*, 81 Ill. 34.

A judgment of a court of competent jurisdiction, having jurisdiction of the cause and parties, cannot be impeached collaterally for fraud.

Christmas v. *Ruseell*, 5 Wallace, 305.
Mason v. *Messinger*, 17 Iowa, 261.
Kelly v. *Mize*, 3 Sneed, 60.

If on inspection of the record it appears that the Court had jurisdiction of the subject-matter and parties, the

judgment is conclusive. It cannot be impeached or called in question in a collateral way by parties or their privies, and is subject to correction only in an appellate court.

VanDoren v. *Horton*, 1 Dutcher's Rep., N. J. 205.

It cannot be questioned, "*and is binding and conclusive upon all other courts of concurrent jurisdiction.*" (Bouvier Dic., Tit. "Res Judicata.")

A decision makes white black, black white, the crooked straight, the straight crooked.

Whatever a Court having jurisdiction of the *res* settles is binding on the world as to the thing. Having jurisdiction as to the *res* and *personam* concludes the parties as to a trust fund. (Greenleaf, vol. 1, § 541–2.)

VI.

Appellees are estopped by the decree in the case of Studwell, Hopkins & Cobb v. *Morgan County in the United States Circuit Court.*

By oversight, perhaps, appellant did not plead as a bar to this proceeding below a decree of the Circuit Court of the United States, rendered in a case wherein Studwell, Hopkins & Cobb, as judgment creditors of the Illinois River Railroad Company, instituted their suit to recover from Morgan county these bonds, or their equivalent, and which, upon the coming in of the answer of the county, was dismissed by the decree of that court.

If pleaded that decree would have been a bar to this action, and given in evidence, as it is, it operates to estop Studwell, Hopkins & Cobb, and the appellees, who are their privies, from again litigating for these bonds.

The evidence of this decree is secondary, and if objected to would have necessitated the production of the Record, or a transcript of it. But unobjected to, it is in evi-

dence, and operates to estop complainants from having their action against the county.

The evidence of this decree is found—

1. In the admission of appellees' brief. (Appellees' brief, page 41.)

2. Testimony of I. L. Morrison for appellees. (Printed transcript of Rec., 98.)

3. In testimony of H. G. Whitlock for appellees. (Printed transcript, Rec., 102.

4. Statements of Mr. Campbell, of counsel for appellee, in open court.

5. Testimony of H. E. Dummer; cross-examination by appellee. (Transcript, p. 126.)

Mr. Dummer was not then counsel for Morgan county, but was acting for the creditors of Illinois railroad company, who were complainants in the Blair case.

The dismissal of this case after answer barred complainants therein.

Borrowscale v. *Tuttle*, 5 Allen, Mass. 377.
Coffman v. *Brown*, 15 Miss., 125.
Sullivan v. *Bunster* 1 E. D. Smith, 681.
Wilcox v. *Bagler*, 6 Ohio, 406.
2 Del. ch., 27.
Munson v. *Munson*, 30 Conn. 582.
28 Conn. 532.

Though this decree was not pleaded, it being in evidence without objection to its competency or relevancy, it operated to estop complainants from the relief sought.

Bigelow on Estoppel, chap. 20, p. 518.

The fact that this record was in the Court trying this case, probably led to the waiver of objection to the competency or relevancy of the testimony.

VII.

It is inequitable to require Morgan County to pay this decree.

1. The complainants purchased bonds of the Illinois River Railroad Company to the amount of $1,020,000 for the sum of $200,000—about twenty cents on the dollar. The bonds bore ten per cent. interest or $100,000 a year; fifty per centum on the amount actually advanced. They were secured by a trust deed of extraordinary powers. Of course the object of so large an incumbrance was to absorb all the stock, property and franchises of the company, to defeat claims of other creditors, and to secure the road and all its effects for the sum advanced. There was default in the payment of the interest, which might have been expected, for the mortgage called for over $100,000 a year in interest from an enterprise in which the bondholders had invested but $200,000.

They took possession of the road, foreclosed their trust deed, obtained an order for the sale of the property, purchased it at the sale for $400,000, and took a judgment for balance due of $1,061,000. The road covered by the mortgage was forty miles long. They loaned $5,000 a mile on it, and bought it in for $10,000 a mile, and took a judgment for the balance due, equal to $25,500 a mile.

2. The complainants in this case never advanced a dollar on account of the subscription of Morgan County to the Illinois River Railroad Company. The bonds in question have never passed into the hands of innocent holders for value before or after maturity. They have never passed out of the hands of the custodians, where they were placed for a particular purpose (to be paid out for work done in Morgan County), and those appointed by the court, until, by order of the Circuit Court

of Morgan County, they were ordered to be delivered to the county for cancellation. None of the principles invoked for the relief of *bona fide* purchasers for value before maturity, apply to the bonds in question.

3. The bonds shoud never have been issued and placed in the hands of Elliott and Brown but for the agreement that they would be used to pay for work in Morgan County. (See answer of trustees, Record, pp. 64, 66, 67.) And but for the further fact that the president of the road filed a certificate with the County Court to the effect that a contract had been made with Allen and McGrady to build the road to Jacksonville, the county seat of Morgan County, and that in that contract it was stipulated that the contractors were to be paid the Morgan County bonds for work done in that county. Yet the railroad company, after they had procured the issue of the bonds, used an order for $4,000 of the bonds to buy off the contractors, who were to build the road in the county. (See answer of trustees, p. 67.)

4. After the Illinois River Railroad Company had failed to build the road in Morgan County the trustees, Studwell, Hopkins and Cobb, procured a charter from the Legislature, organizing the Peoria, Pekin and Jacksonville Railroad Company. To this new company the purchasers of the railroad, Allen, Arnold and Trowbridge, the complainants in this case, conveyed the Illinois River Road and all its property, franchises, &c. The new company did not secure any additional franchises from the Legislature which the old company did not have. The object in procuring the new charter was evidently to create a purchaser for the old company's road, which could take all its property and assets, without incurring any of the liabilities of the old company. The complainants as purchasers of the old road took all its real and personal property, and as judgment creditors they now claim all the assets of the old com-

pany. By this legislative proceeding they destroyed all the rights of the stockholders who had furnished most of the money to build the road, and by their subsequent conduct they sought to defeat the claims of laborers, contractors, and material men who had aided in building the road, and whose claims Studwell had contracted that the Illinois Railroad Company should pay in full out of the assets of the company. (See his contract, Record, p. 222). Mr. Greene, of counsel for complainants, asserted in argument that most of the claims of creditors allowed in the Blair case were fraudulent. There is no evidence in the record to sustain this charge, nor to negative the authority of Mr. B. S. Prettyman, the vice-president and attorney of the Illinois River Railroad, to enter the appearance of the old company, and appear as its counsel. Mr. Prettyman is a prominent lawyer in Illinois, well known to all the courts. His authority must be presumed until the contrary is proven.

5. Before proceeding to build the road under the new charter in Morgan county, John Allen, the president of the new company and one of complainants, threatened to divert the road from Jacksonville unless that city would pay $50,000. A citizens' meeting was called. Mr. Morrison, one of Mr. Allen's attorneys in this case, was consulted as to whether Morgan county would have to pay the $50,000 subscribed to the old company. He said "no." And thereupon, in order to secure the building of the road in Morgan county to Jacksonville, $50,000 were subscribed by that city and paid. This secured the building of the road to that city.

6. While the new charter was pending in the Legislature, Messrs. Studwell & Hopkins, two of the trustees, stipulated that the new charter should in no way affect the rights of trustees or bondholders or creditors of the old company to the Morgan County bonds, "now [then] in liti-

gation in the Circuit Court of Morgan County, but the right and title to said bonds shall be left to be decided in the suit now [then] pending in the said suit in the Morgan County Circuit Court." (See Record, p. 217). The suit referred to was that known as the Vail & Ladd case, in argument, in which Messrs. Studwell, Hopkins & Cobb were impleaded, answered, and appealed to the Supreme Court of Illinois, where the judgment dismissing their bill of interpleader, and denying their right to the bonds, was affirmed. They not only had their day in court, but they agreed beforehand to abide by the judgment.

7. If complainants, as judgment creditors, were entitled to the bonds in question, they should have brought forward this ground for recovery in the Vail & Ladd case, through their trustees, who were parties to that suit. They should have litigated all their rights in that case. The rule in chancery is that parties must set up all of the rights which they have in and to the subject-matter in controversy. If, pending the action, and before final decree, they acquire a new right to the subject-matter, they must assert it by appropriate pleadings, either by amendment to their answer, if defendants, or by a supplemental bill, if complainants. Complainants cannot litigate their rights by piecemeal and legal experiments. This doctrine is too well understood to require citation of authority.

8. We invite the attention of the court to the consequences of this decree which will illustrate the hardship which would ensue if this decree is permitted to stand.

It must be borne in mind that Morgan county has never sought litigation, but has always defended.

The county was subrogated to the rights of the parties, whose demands against the Ills. R. R. R. she paid by the force of the decrees against her, and the only assertion of fraud comes from Mr. Morrison, who was her counsel in

the proceeding assailed, and from Mr. Whitlock, who was also her counsel. (Transcript of Record, 257.)

Each of these gentlemen sign the answer of Morgan County in the Blair case. (Record, 257.)

If required to pay this decree the people of Morgan county will have paid to get this road as follows:

Amount of Vail & Ladd decree.....	$ 7,008.10
" Blair "	41,145.24
" Schooley & West decree.....	1,176.48
" Wm. Thomas decree.....	6,160.00
Outstanding bonds (put out by Mr. Morrison)	1,580.80
Costs and legal expenses	2,102.66
Attorney's fee found by U. S. court to Morrison & Epler.....	4,700.00
Subscription of City of Jacksonville.....	50,000.00
Amount of present decree.....	72,539.56
Total.....	$186,726.84

Morgan county contracted to give her $50,000 of bonds to get this road built to Jacksonville, and through threats of diversion of the road, (see testimony of Reynolds, transcript, p. 130,) the new railroad company, through Mr. Allen, one of the complainants herein, obtained $50,000 from the City of Jacksonville, in Morgan County, which, with the other sums paid and the decree in this case, make an aggregate of $186,726.84. If such are the workings of equity we are unable to see what would be inequitable.

VIII.

Messrs. Studwell, Hopkins & Cobb continued to hold and exercise the office of trustees until discharged by order of the United States Circuit Court, July 6, 1869.

The question was raised in argument as to the time when Studwell, Hopkins & Cobb ceased to be trustees.

The counsel for complainants held the trust was terminated when the sale was made, Oct. 1, 1863. We contended in argument that the trust was not terminated until the trustees were discharged by order of the Court in July 1869. The record relieves the question of all doubt.

The Illinois River Railroad Company, by deed executed November 1, 1858 (Rec. p. 16), conveyed to said trustees, the railroad, then constructed or thereafter to be conatructed, together with all its lands, depots, shops, etc. and all its franchises, locomotives, cars, tools, all goods and chattels, together with rents, issues, income, profits, moneys, rights, benefits and advantages, then held or thereafter to be acquired (Rec., p. 18), in trust for those who may be the owners of said $1,020,000 of its bonds, which bonds were payable in twenty years. The trust deed further provided that upon the payment "*in full*" of said bonds and the interest due thereon, then "these presents (the trust deed) and the estate granted should cease and be void." (Rec. p. 23.) The deed also provided that in case of default in any of the payments of interest the whole debt should become due, and the trustees were authorized to take possession of the entire property, collect receipts, and sell the road without foreclosure in Court (Rec. p. 22.) The railroad company failed to pay the interest, and on July 12th, 1862, the trustees took possession of the road and all its property, and proceeded to operate it as trustees. On December 17th, 1862, they filed a bill in the United States Circuit Court for the Southern District of Illinois to foreclose the trust deed.

June 16, 1863, they obtained a decree for the amount due, about $1,400,000, and an order for the sale of the property. The sale was made October 1, 1863, for $400,000, the purchasers being Allen, Arnold and Trowbridge, the complainants in the case at bar. They were also the bondholders.

The master's report was approved June 24, 1864,

and judgment rendered in the names of the trustees for the balance, $1,061,292.56. The decree for the sale of the property having directed the trustees, after receiving the proceeds of the sale, to cause a notice to be published in Springfield, Illinois, and in New York, requiring the bondholders to present their bonds for payment *pro rata* as provided, and the trustees not having been discharged, the cause was continued for further report.

On the 6th day of July, 1869, affidavits having been filed, showing that the trustees had fully discharged all their duties as trustees under the mortgage or deed of trust, and that they had fully accounted for all moneys received by them as such trustees, it was ordered, adjudged and decreed that Studwell, Hopkins and Cobb be forever discharged as trustees under the mortgage, and the said trust was declared finally settled, adjusted, and closed. (Record, pp. 45–6.)

On the 13th of October, 1865, one year and four months after the sale of the property, under the trust deed, their bill of interpleader having, on that day, been dismissed in the Vail and Ladd case in the Morgan County Circuit Court, the trustees appeared in that court and prayed an appeal to the Supreme Court of Illinois. Record, p. 61.) At the January term, 1868, of the Circuit Court of the United States at Springfield, Studwell, Hopkins and Cobb filed a bill in chancery as trustees, to reach the bonds in question, on the ground that they were judgment creditors of the Illinois River Railroad Company. (Dep. of Morrison, Record, p. 98). They dismissed their bill in that court, on the coming in of the answer of Morgan County, the respondent in that case. (Record, p. 98.)

We thus find from the record that Studwell, Hopkins and Cobb continued to act as trustees for the bondholders, under the deed of trust, until they were finally dis-

charged by the United States court in 1869. Their trust having been created to continue until all the bonds were paid *in full*, they could not be discharged from their trust until that time, unless by consent of all the parties interested, or by a discharge by the authority of the court where the suit for foreclosure was pending.

The trustees having continued to act as such until discharged by order of court, are estopped from claiming release from the trust prior to that time. The *cestui que trusts* having made no objection in the court to the discharge of the trustees, we have a right to presume that all their acts as such trustees were approved by them. The *cestui que trusts* are also estopped from disavowing the acts of the trustees in their behalf, prior to their discharge by the court, since they were discharged without objection. If the court had not discharged the trustees, there might have been some doubt as to the exact time when they were discharged by a full performance of all the trusts. But the judgment of the court, that they were discharged from and after a particular date, negatives the idea of a discharge by full performance of the trusts prior thereto. Studwell, Hopkins and Cobb were therefore trustees under the trust-deed until July, 1869, nearly four years after they prayed an appeal in the Vail & Ladd case, upon the dismissal of their bill of interpleader, and eighteen months after they dismissed their bill in chancery, in the United States Court at Springfield, to reach the bonds in question as judgment creditors of the Illinois River Railroad Company.

IX.

Counsel for Morgan county in this case concede to its fullest extent the doctrine announced by this court in the case of *Sawyer* v. *Hoag*, 17 Wallace, 620, and re-affirmed in *Scammon* v. *Kimball*, 2 Otto, 362, to the effect "that

subscriptions to the capital stock of corporations are trust-funds devoted to the payment of all the creditors of the company." In three cases, which went to the Supreme Court of Illinois, reported in 39th, 59th and 76th Ill. Reports, and in the Blair case, which was not appealed, the subscription of Morgan county has been applied by proper adjudication to the payment of such creditors, and all these adjudications have either directly denied the right of complainants, or their privies, to any part of these bonds, or have assumed that no such right existed.

X.

The opinion of the Court is not before the writer, and the suggestions here made are of very uncertain value, and the purpose we hope to accomplish hereby is in the nature of a reconsideration, to give us an ample opportunity, in the light of a divided Court, to again present this case. The time in which this paper has had to be prepared, has rendered the preparation of an argument; which would materially aid the Court, a simple impossibility. Its imperfections are not so well known to any one or so much regretted as by the writer.

Respectfully submitted,

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J. T. SPRINGER,
E. P. KIRBY,
WM. BROWN,
For Petitioner.